TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 60

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

DIXIE CARRIERS, INC., GULF CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.

No. 61

UNITED STATES OF AMERICA, APPELLANT,

vs.

DIXIE CARRIERS, INC., ET AL.

No. 62

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

DIXIE CARRIERS, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

NO. 60 FILED DECEMBER 21, 1956

NO. 61 AND NO. 62 FILED DECEMBER 27, 1956

PROBABLE JURISDICTION MARCH 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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[fol. 1] [Caption omitted in printing]

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, UNION BARGE LINE CORPORATION, JOHN I. HAY COMPANY, COYLE LINES INCORPORATED, FEDERAL BARGE LINES, INC., WATERWAYS FREIGHT BUREAU, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT TO SET ASIDE, ANNUL, AND SUSPEND ORDERS OF THE INTERSTATE COMMERCE COMMISSION—
Filed February 16, 1956

I.

This action is brought under Section 17(9) of the Interstate Commerce Act [Title 49 U.S.C., Section 17(9)] and Title 28 U.S.C., Sections 1336, 1398, 2284, 2321, 2322, 2323, 2324, and 2325, and pursuant to Section 10 of the Administrative Procedure Act (Title 5 U.S.C. Section 1009) to set aside, annul, and suspend the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, a proceeding entitled *Pipe-Official and Southern Territories to Southwest,* and to set aside, annul, and suspend the order of the said Commission dated December 9, 1955, in connection with a related proceeding docketed as Fourth Section Application No. 31120 and entitled *Steel and Wrought Iron Pipe to the Southwest* (said order being designated 26th Supplemental Fourth Section Order No. 17160), and all rate schedules or tariffs published or filed with the said Interstate Commerce Commission in purported compliance with or reliance upon said Orders, all as more fully hereinafter set forth.

II.

(1) Plaintiff Dixie Carriers, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Houston, Texas. It is [fol. 3] a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(2) Plaintiff Gulf-Canal Lines, Inc. is a corporation organized and existing under the laws of Texas, with its principal offices at Houston, Texas. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(3) Plaintiff Mississippi Valley Barge Line Company is a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the State of Missouri. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(4) Plaintiff American Barge Line Company is a corporation organized and existing under the laws of the State of Delaw-re, with its principal offices at Jeffersonville, Indiana. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(5) Plaintiff Union Barge Line Corporation is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal offices at Pittsburgh, Pennsylvania. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(6) Plaintiff John I. Hay Company is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Chicago, Illinois. It is

a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(7) Plaintiff Coyle Lines Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at New Orleans, Louisiana. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

[fol. 4] (8) Plaintiff Federal Barge Lines, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at St. Louis, Missouri. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(9) Plaintiff Waterways Freight Bureau is an unincorporated voluntary association composed of the principal common carriers by water operating in the Mississippi River System, Gulf Intracoastal Waterway, and the Gulf of Mexico, including among its members the water carrier plaintiffs enumerated above.

III.

The United States of America is made defendant herein pursuant to the provisions of Title 28 U.S.C.A. Section 2322.

IV.

The water carrier plaintiffs enumerated above, in single or interline service, transport commodities generally by barge line between the principal pipe producing areas in those portions of the United States designated Official and Southern Territories, and the pipe consuming areas of that portion of the country designated the Southwest. The transportation of pipe between such areas is and for many years has been a most important part of their traffic and produces revenues which are very important to the financial stability of the said plaintiffs and to their continued ability to provide adequate common carrier service.

V.

By application filed on their behalf with the Interstate Commerce Commission under date of September 16, 1955, and docketed by the said Commission as Fourth Section Application 31120, rail carriers, party to certain agency tariffs, sought authority to put into effect certain drastically reduced rates on steel and wrought iron pipe moving from various origins in Official and Southern Territories to various destinations in the Southwest, in violation of Section 4(1) of the Interstate Commerce Act [49 U.S.C. Section [fol. 5] 4(1)],[1] which makes it unlawful for such carrier to charge more for the transportation of like property for a shorter than for a longer distance over the same line or route in the same direction.

At the same time there was also published and filed with the Commission on behalf of said rail carriers a joint tariff entitled Supplement 43 to Agent Kratzmeir's I.C.C. 4116,

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[1] It shall be unlawful for any common carrier subject to this part of part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *and provided further,* that tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

and Agent Hinsch's I.C.C. 4615, which would have made such reduced rates effective on October 26, 1955.

Plaintiff water carriers, through the Waterways Freight Bureau, which acted for them and on their behalf, petitioned said Commission to suspend the operation of the said tariff and to deny the relief from provisions of Section 4(1) sought by the said application. Similar petitions were filed by other interested parties. Responses thereto were filed on behalf of the said rail carriers.

Pursuant to the Commission's rules and regulations, and delegations of functions made by the Commission,[2] the matter of the protests against the rates as published was referred to the Commission's Board of Suspension, and the matter of the application for relief from the provisions of Section 4(1) of the Act, and the protests thereto, was referred to the Commission's Fourth Section Board.

[fol. 6] Under date of October 20, 1955, the Commission, by its Board of Suspension acting under such delegation, entered an order suspending[3] the operation of the said joint rate tariff (except one item thereof) and instituting an investigation thereof in a proceeding designated Investigation and Suspension Docket No. 6491, and entitled *Pipe-Official and Southern Territories to Southwest.* A copy of that order is appended hereto as Exhibit 1. At that time neither the Commission nor any Division or Board thereof took any action on the related matter of the application for relief from the provisions of Section 4(1).

Thereafter, by order dated November 25, 1955, the Commission assigned both such proceedings, I. & S. Docket No. 6491 and F.S.A. Docket No. 31120, for hearing before a Hearing Examiner of the Commission at Houston, Texas, to begin on January 24, 1956.[4] A copy of that order is appended hereto as Exhibit 2.

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[2] Under authority of Section 17(2) of the Interstate Commerce Act [49 U.S.C. 17(2)].

[3] Under authority of Section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7)].

[4] That hearing did commence on that date. On January 27, 1955, the Hearing Examiner having other commitments for the following week, the hearing was adjourned. It is to be recessed in Washington, D. C. on March 5, 1956.

In the meantime, on or about October 26, 1955, there had been filed with the Commission on behalf of said rail carriers a petition for reconsideration of the Order of the Board of Suspension of October 20, 1955, in I. & S. Docket No. 6491.

At the same time there was also filed on behalf of said rail carriers in the proceeding under F.S.A. 31120, a petition entitled "Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Application Herein, Dated September 16, 1955."

Plaintiff water carriers again acting through their agency, Waterways Freight Bureau, filed timely replies to these documents.

VI.

Under date of December 7, 1955 the Commission, by Division 2, acting as an Appellate Division, entered an order vacating its order, by the Board of Suspension, of October 20, 1955, in I. & S. 6491, such vacation to be effective December 17, 1955. That order was served on Decem- [fol. 7] be. 13, 1955. A copy of that order is appended hereto as Exhibit 3.

Under date of December 9, 1955, and obviously responsive to the petition of October 26, 1955, in F.S.A. 31120, the Commission entered an order designated 26th Supplemental Fourth Section Order No. 17160, granting the requested relief from the prohibition of Section 4(1) of the Act, effective "upon the effective date of the rates as to which relief is hereinafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120." [The "effective date of the rates" was to be December 17, 1955, as provided in the order of December 7, 1955 (Exhibit 3) vacating the order of suspension in I. & S. Docket No. 6491.] That order was served on December 27, 1955, and a copy thereof is appended hereto Exhibit 4. Its wording indicates confusion within the Commission as to the procedural status of that matter at that point. In the heading it is indicated that the order was the result of action by Division 2 of the Commission, sitting as an Appellate Division. The fact, so far as plaintiffs are able to determine it, is that there had

been no previous action on the Fourth Section matter by the Commission, nor any Division or other agency thereof, except to assign it to a Hearing Examiner for hearing (Exhibit 2), and therefore it was not in any sense an appellate action. The evident confusion is not clarified by the final line, which states that it is the action of the Commission, by its Fourth Section Board.

VII.

Immediately upon obtaining informal advice that such orders had been entered, and necessarily before the orders themselves had been served upon them or otherwise made available, plaintiff water carriers, again through their agency, Waterways Freight Bureau, and others adversely affected, filed petitions for reconsideration of the order of December 7 in I. & S. Docket No. 6491 and the order of December 9 granting the relief sought in F.S.A. 31120. The petition of plaintiffs was dated December 13, 1955, was filed with the Commission on December 14, 1955, and included a specific prayer for a stay of such orders pending reconsideration, pursuant to the provisions of Section 17(8) of the Interstate Commerce Act [49 U.S.C. 17(8)], which provides, *inter alia*, that where reconsideration of an initial [fol. 8] decision by the Commission is sought the effective date of such decision shall be stayed pending disposition of the matter.[5]

VIII.

Under date of December 5, 1955, the Commission released a notice, signed by its Secretary, with reference to the said

[5] (8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

petitions for reconsideration insofar as they related to the issue of I. & S. Docket No. 6491, advising that such petitions would "not be entertained for consideration by the entire Commission for the reason that this matter has been delegated to an appellate division and its action is not subject to review by the entire Commission." Copy of that Notice is appended hereto as Exhibit 5.

Under date of December 16, 1955, the Commission released another notice, signed by its Secretary, again with reference to I. & S. Docket No. 6491, advising that "The Commission today has concluded that sufficient reasons have not been shown for staying the order of December 7, 1955, and the petitions making such request have been denied." Copy of that notice is appended hereto as Exhibit 6.

The Commission took no action whatever, so far as plaintiffs are able to determine, with respect to the petition insofar as it sought reconsideration of the order of December 9, 1955, granting relief from the prohibition of Section 4(1).

The reduced rates in question thus were permitted to become effective on December 17, 1955, with the effective date of the order of December 7, 1955, vacating the suspension order in I. & S. 6491, and pursuant to the Fourth Section Relief afforded by the order of December 9, 1955, without which relief such rates would be in direct violation of the prohibition of Section 4(1).

[fol. 9] IX.

By its action aforesaid, the Commission has failed and neglected to afford consideration of plaintiffs' petition for reconsideration of the initial action of the Commission in granting the said Fourth Section Relief, and has deprived plaintiffs of the benefit and protection provided by Section 17(8) of the Act, pursuant to which the effective date of such initial action responsive to Fourth Section Application No. 31120 should have been "stayed or postponed pending disposition of the matter by the Commission or appellate division * * *".

X.

Section 4(1) of the Interstate Commerce Act[6] prohibits the charging of higher rates for a shorter than for a longer haul over the same line or route in the same direction, subject only to the exception that the Interstate Commerce Commission may in special cases and after investigation grant petitioning carriers relief from such prohibition. It contains no provision for the granting of temporary relief prior to such investigation, and by its very terms makes the granting of such relief a condition precedent to the effectiveness of tariffs containing rates made in violation of the prohibition contained in that section.

Here the Commission has applied the statute in such manner as to make the grant of relief from the prohibition of Section 4(1) subservient to the operation of the rates, rather than to follow the reverse procedure which the statute clearly contemplates; and it has granted such relief without the investigation which the statute requires, which the Commission itself initiated, and the form and scope of which the Commission determined when it assigned the matter for hearing[7] as described above, all in contravention of the plain intent of the statute, and to the injury of plaintiff water carriers.

[fol. 10] XI.

The Commission's order of December 7, 1955 (Exhibit 3) vacating its order of suspension in I. & S. Docket No. 6491 (Exhibit 1) states as its sole foundation and only justification:

> "*It further appearing,* That consideration has been given to a petition of the respondent requesting vaca-

[6] 49 U.S.C. 4(1)—Quoted in footnote 1, *supra.*

[7] Recognition by the Commission that the requirement of Section 4(1) that authorization of relief shall be granted, if at all, after investigation, clearly implies that the question shall be determined upon testimony and after a hearing, is evidenced by the fact that Rule XVIII(f) of its Rules of Practice relating to Fourth Section applications (Volume 8, Interstate Commerce Act Annotated, page 6267), includes the statement "It is the uniform practice of the Commission to hold hearings upon the request of any interested party."

tion of the order of suspension, and replies thereto; and good cause appearing therefor:".

By that action, unsupported by even the slightest indication of facts or reasons underlying the action, the Commission reversed its early action by which it found that it appeared that the rates as published would result in violations of the Interstate Commerce Act. Specifically, the Commission (Board of Suspension) had earlier found:

> "*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:" [8]

Both the ordinary rules of orderly procedure, and the spirit and the letter of the Administrative Procedure Act,[9] require that the Commission enter its orders upon the basis of stated reasons therefor, sufficiently explicit to appraise the parties at interest of the facts, circumstances and considerations which have impelled its action.

XII.

By its actions as hereinbefore described the Commission has acted arbitrarily and capriciously, and contrary to the [fol. 11] applicable statute. Unless restrained by this Court, the Commission will permit for an indeterminate period the railroad competitors of these plaintiffs to main-

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[8] Exhibit 1, second paragraph.

[9] For example, Section 8(b) of the Administrative Procedure Act [49 U.S.C. 1007(b)] provides in part "• • • All decisions (including initial, recommended, or tentative decisions) shall become a part of the record, and include a statement of (1) findings and conclusions, as well as the reasons or basis thereof, upon all the material issues of fact, law or discretion presented on the record • • •."

tain reduced rates in violation of the prohibition of Section 4(1) of the Act, at levels which will result in serious and irreparable injury to thsee water carrier plaintiffs.

WHEREFORE, the plaintiffs pray:

1. That a court, consisting of three judges, constituted as required by Title 28, U.S.C. Section 2284, be convened, and that process and notice be given to the defendant as required by law.

2. That upon final hearing the court adjudicate, order and decree that the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, and the order of the Commission dated December 9, 1955, granting the relief sought in Fourth Section Application No. 31120, are unlawful, null and void *ab initio* and that they be set aside and that the enforcement thereof be enjoined, annulled and set aside; and that the use in interstate or foreign commerce of Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and any and all other railroad rate tariffs and schedules which became or were allowed to become effective by reason of the said orders of December 7 and 9, 1955 (to the extent that they publish rates suspended by the Order of October 20, 1955, or rates which are in contravention of Section 4(1) of the Interstate Commerce Act) be prohibited until such time as the Order of October 20, 1955 in Investigation and Suspension Docket No. 6491 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission, and the Interstate Commerce Commission shall have concluded its investigation into the matters and things involved in Fourth Section Application No. 31120 and shall have issued a lawful and valid order thereon.

3. That plaintiffs be given such other and further relief [fol. 12] as may be equitable and proper in the premises.

Nuel D. Belnap, Belnap and McAuliffe, One North La Salle Street, Chicago 1, Illinois

T. S. Christopher, Christopher and Bailey, Continental Life Building, Fort Worth 2, Texas

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 5, D. C.

Donald Macleay, Francis W. McInerny, Macleay, Lynch & MacDonald, 1625 K Street, N. W., Washington 6, D. C.

Alan S. Dale, Eastham, Hinds & Dale, 212 Cotton Exchange Building, Houston 2, Texas
Attorneys for Plaintiffs

Duly sworn to by J. S. Hinkle jurat omitted in printing.

[fol. 13] EXHIBIT 1 TO COMPLAINT

SECOND CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows:
On Page 6 thereof, ITEM 360-C, and on pages 2 and 4 thereof all matter referring to ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would if permitted to become effective, result in rates and charges, rules, regulations or practices

which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 14] EXHIBIT 2 TO COMPLAINT

I&S No. 6491, ET AL TM:HA

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

NOVEMBER 25, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE-OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION No. 31120

STEEL AND WROUGHT IRON PIPE TO THE SOUTHWEST

The above-entitled proceedings are assigned for hearing on January 24, 1956, at 9:30 o'clock a.m., United States Standard Time, at the Federal Office Bldg., Franklin & Fannin Sts., Houston, Tex., before Examiner, Hanson.

The attention of the parties is directed to the General Rules of Practice, Rule 84(d), the provisions of which point to the desirability of interchange of exhibits and other pertinent material before the hearing.

By the Commission.

HAROLD D. MCCOY,
Secretary.

[fol. 15] EXHIBIT 3 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices

stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; and good cause appearing therefor:

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

HAROLD D. McCOY
Secretary

(SEAL)

[fol. 16] EXHIBIT 4 TO COMPLAINT

Twenty-sixth Supplemental Fourth Section Order No. 17160

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A. D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratzmeir, Agent, for and on behalf of carriers parties to his tariff I.C.C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of

fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, upon the effective date of the rates as to which relief is hereinafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 17] EXHIBIT 5 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION
Washington

December 15, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

NOTICE

This refers to certain petitions tendered herein seeking reconsideration or review by the Commission of appellate action of Division 2 in which the Division modified the action of the Board of Suspension.

The said petitions will not be entertained for consideration by the entire Commission for the reason that this matter has been delegated to an appellate division and its action is not subject to review by the entire Commission. See item 8.4 of the Organization Minutes of the Commission, 20 Federal Register 5031, 5035.

The petitions will be considered by the appropriate appellate division for action as provided by Rule 101(g) of the Commission's General Rules of Practice.

Harold D. McCoy,
Secretary.

[fol. 18] EXHIBIT 6 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D. C.

December 16, 1955

NOTICE

Upon consideration of a petition filed by respondents requesting vacation of the order of suspension in I. and S. Docket No. 6491 dated October 20, 1955, the Commission in its order of December 7, 1955 concluded to vacate the

order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved.

Several of the protestants filed petitions requesting the Commission to reconsider its action and to stay the order of December 7, 1955.

The Commission today has concluded that sufficient reasons have not been shown for staying the order of December 7, 1955 and the petitions making such request have been denied.

HAROLD D. McCOY,
Secretary.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, UNION BARGE LINE COMPANY, JOHN I. HAY COMPANY, COYLE LINES INCORPORATED, FEDERAL BARGE LINES, INC., WATERWAYS FREIGHT BUREAU, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

JOE D. HUGHES, INC., HUNSAKER TRUCKING CONTRACTOR, INC., COMBS TRUCK LINE, INC., YOUNGER BROS.-J. M. ENGLISH TRUCK LINES, INC., SOUTHWEST OILFIELD TRANSPORTATION CO., PRATHER TRUCK LINE, INC., Intervenors.

MOTION OF JOE D. HUGHES, INC., ET AL. TO INTERVENE AS PLAINTIFFS—Filed March 1, 1956

I.

Intervenors move for leave to intervene as plaintiffs in this action as of right as provided in Title 28, #2323, U.S.C. (28 U.S.C.A. #2323) and Title 28, Rule 24, in order

to assert the same complaints alleged by plaintiffs in this action and as set forth in intervenors' proposed complaint, copy of which is hereto attached, on the grounds that all of intervenors herein timely petitioned the Interstate Commerce Commission, along with the plaintiff water carriers, to suspend the operation of the rail tariffs involved in [fol. 20] the proceedings before the Interstate Commerce Commission now designated as Investigation and Suspension Docket No. 6491, entitled *Pipe—Official and Southern Territories to Southwest;* and likewise petitioned said Commission to deny the rail carriers' petition for relief from the provisions of Section 4(1) of the Interstate Commerce Act and which proceeding is designated by the Commission as FSA Docket Number 31120. That these intervenors have continued their protest before the hearing examiner of the Commission to which both proceedings were assigned for hearing. Intervenors are therefore parties in interest to these proceedings before the Interstate Commerce Commission and entitled to appear as parties herein of their own motion and as of right as provided by said #2323, Title 28, U.S.C. and the questions of law and fact to be presented by intervenors are common to the main action.

/s/ John C. Ridley, 2606 Niels Esperson Bldg., Houston 2, Texas, Attorney for Intervenors.

[fol. 21] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION AND NOTICE OF MOTION OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL. FOR LEAVE TO INTERVENE AS DEFENDANTS—Filed March 6, 1956

Now come The Atchison, Topeka and Santa Fe Railway Company, et al., by their attorneys, and move the Court

for an order permitting them to intervene as defendants in the above-entitled action. As grounds for such order, movants show to the Court that:

I

(a) The Atchison, Topeka and Santa Fe Railway Company is a corporation organized and existing under the laws of the State of Kansas, with offices at Chicago, Illinois.

(b) Gulf, Colorado and Sante Fe Railway Company is a corporation organized and existing under the laws of the State of Texas, with offices at Galveston, Texas.

(c) Panhandle and Santa Fe Railway Company is a corporation organized and existing under the laws of the State of Texas, with offices at Amarillo, Texas.

(d) The Baltimore and Ohio Railroad Company is a corporation existing under the laws of the State of Maryland, with offices at Baltimore, Maryland.

(e) Chicago, Rock Island and Pacific Railroad Company is a corporation existing under the laws of the State of Delaware, with offices at Chicago, Illinois.

(f) Erie Railroad Company is a corporation existing under the laws of the State of New York, with offices at Cleveland, Ohio.

[fol. 22] (g) The Kansas City Southern Railway Company is a corporation existing under the laws of the State of Missouri, with offices at Kansas City, Missouri.

(h) Missouri Pacific Railroad Company is a corporation existing under the laws of the State of Missouri, with offices at St. Louis, Missouri, and is the successor in interest and assign of Guy A. Thompson Trustee, Missouri Pacific Railroad Company, Guy A. Thompson, Trustee, International-Great Northern Railroad Company, and Guy A. Thompson, Trustee, New Orleans, Texas and Mexico Railway Company.

(i) New York Central Railroad Company is a corporation existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, with offices at New York, New York.

(j) The Pittsburgh and Lake Erie Railroad Company is a corporation existing under the laws of the State of Pennsylvania, with its offices at Pittsburgh, Pennsylvania.

(k) The New York, Chicago and St. Louis Railroad Company is a corporation existing under the laws of the State of Ohio, with offices at Cleveland, Ohio.

(l) The Pennsylvania Railroad Company is a corporation existing under the laws of the State of Pennsylvania, with offices at Philadelphia, Pennsylvania.

(m) Southern Pacific Company is a corporation existing under the laws of the State of Delaware, with offices at San Francisco, California.

(n) Texas and New Orleans Railroad Company is a corporation existing under the laws of the State of Texas, with offices at Houston, Texas.

(o) The Texas and Pacific Railway Company is a corporation existing under an Act of Congress, with offices at Dallas, Texas.

[fol. 23]

II

Movants are railroads engaged in the transportation of passengers and freight in interstate commerce within The United States of America, including the transportation of steel and wrought iron pipe from the principal pipe producing areas in the eastern and southern parts of the country to the southwestern part of the country.

III

Movants are respondents in the proceedings before the Interstate commerce Commission referred to in the complaint as Investigation and Suspension Docket No. 6491, *Pipe—Official and Southern Territories to Southwest,* and

Fourth Section Application No. 31120, *Steel and Wrought Iron Pipe to the Southwest.* Movants have a right to intervene in this action under the provisions of Section 2323 of Title 23 of the United States Code and Rule 24 of the Rules of Civil Procedure for The United States District Courts.

/s/ Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas.

Edwin N. Bell, Baker, Botts, Andrews & Shepherd, 1600 Esperson Bldg., Houston 2, Texas.

Robert H. Bierma, 652 Union Station, Chicago 6, Illinois.

Harry E. Boe, LaSalle Street Station, Chicago 5, Illinois.

Robert G. Boes, 3016 Terminal Tower, Cleveland, Ohio.

[fol. 24] Ralph M. Buzek, 1315 Union Central Life Bldg., Cincinnati 2, Ohio.

J. T. Clark, Midland Bldg., Cleveland 15, Ohio.

William E. Davis, 114 W. 11th St., Kansas City 5, Missouri.

Harvey Huston, 1211 Railway Exchange Bldg., Chicago 4, Illinois.

William R. McDowell, Texas and Pacific Bldg., 1025 Elm St., Dallas, Texas.

Richard J. Murphy, 1225 LaSalle Street Station, Chicago, Illinois.

Walter G. Treanor, Missouri Pacific Bldg., St. Louis, Missouri.

Attorneys for Intervening Railroads.

[fol. 25] To: Messrs. Nuel D. Belnap, Belnap and McAuliffe, One North LaSalle Street, Chicago 1, Illinois.

T. S. Christopher, Christopher and Bailey, Continental Life Building, Fort Worth 2, Texas.

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 5, D. C.

Donald Macleay, Francis W. McInerny, McLeay, Lynch & MacDonald, 1625 K Street, N. W., Washington 6, D. C.

Alan S. Dale, Eastham, Hinds & Dale, 212 Cotton Exchange Building, Houston 2, Texas.
Attorneys for Plaintiffs.

To: The Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.
The Attorney General, Washington, D. C.
Attorneys for Defendant, United States of America.

To: Mr. John C. Ridley, 2606 Niels Esperson Bldg., Houston, Texas, Attorney for Intervening Truck Lines.

The intervening railroads will move the submission of the above motion to this Court on Monday, March 19, 1956.

Palmer Hutcheson, Jr., Hutcheson, Taliaferro and Hutcheson, Attorney for Intervening Railroads.

A copy of the above motion and the accompanying pleadings were served upon attorneys for all parties by mailing copies thereof addressed to each of them this date.

Palmer Hutcheson, Jr.

This 6th day of March, 1956.

[fol. 26] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION AND NOTICE OF MOTION OF WABASH RAILROAD COMPANY FOR LEAVE TO INTERVENE AS DEFENDANT—Filed March 15, 1956

Now comes Wabash Railroad Company, by its attorneys, and moves the Court for an order permitting it to intervene as a defendant in the above-entitled action. As grounds for such order, movant shows to the Court that:

I

Wabash Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with offices at St. Louis, Missouri.

II

Wabash Railroad Company is a railroad engaged in the transportation of passengers and freight in interstate commerce within the United States of America, including the transportation of steel and wrought iron pipe from the principal pipe producing areas in the eastern and southern parts of the country to the southwestern part of the country.

III

Wabash Railroad Company is a respondent in the proceedings before the Interstate Commerce Commission referred to in the complaint as Investigation and Suspension [fol. 27] Docket No. 6491, *Pipe—Official and Southern Territories to Southwest,* and Fourth Section Application No. 31120, *Steel and Wrought Iron Pipe to the Southwest.* Wabash Railroad Company has a right to intervene in this action under the provisions of Section 2323 of Title 23 of the United States Code and Rule 24 of the Rules of Civil Procedure for the United States District Courts.

/s/ Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas.

Eugene S. Davis, Railway Exchange Bldg., St. Louis 1, Missouri.

Attorneys for Wabash Railroad Company.

[fol. 28] To: Messrs. Nuel D. Belnap, Belnap and McAuliffe, One North La Salle Street, Chicago 1, Illinois.

T. S. Christopher, Christopher and Bailey, Continental Life Building, Fort Worth 2, Texas.

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 5, D. C.

Donald Macleay, Francis W. McInerny, McLeay, Lynch & MacDonald, 1625 K Street, N. W., Washington 6, D. C.

Alan S. Dale, Eastham, Hinds & Dale, 212 Cotton Exchange Building, Houston 2, Texas.
Attorneys for Plaintiffs.

To: The Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.
The Attorney General, Washington, D. C.
Attorneys for Defendant, United States of America.

To: Mr. John C. Ridley, 2606 Niels Esperson Bldg., Houston, Texas, Attorney for Intervening Truck Lines.

Attorneys for Intervening Railroads who filed their Motion to Intervene on March 6, 1956, have previously been furnished copies of this Motion and the accompanying pleadings.

The Wabash Railroad Company will move the submission of the above Motion to this Court on Monday, March 26, 1956.

Palmer Hutcheson, Jr., Hutcheson, Taliaferro and Hutcheson, Attorney for Wabash Railroad Company.

A copy of the above motion and the accompanying pleadings were served upon attorneys for all parties by mailing copies thereof addressed to each of them this date.

This 15th day of March, 1956.

Palmer Hutcheson, Jr.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—March 29, 1956

The motion of Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros.-J. M. English Truck Lines, Inc., Southwest Oilfield Trans-

portation Co., and Prather Truck Line, Inc. to intervene as parties plaintiff is granted, and the clerk will forthwith file their complaint.

The motion of The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Erie Railroad Company, The Kansas City Southern Railway Company, Missouri Pacific Railroad Company, New York Central Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Pacific Company, Texas and New Orleans Railroad Company, and The Texas and Pacific Railway Company to intervene as parties defendant is granted, and the clerk will forthwith file their answer.

The motion of Wabash Railroad Company to intervene as a party defendant is granted, and the clerk will forthwith file its answer.

The clerk will forthwith forward a copy of this order to all attorneys of record.

Done at Houston, Texas, on this, the 29th day of March, 1956.

/s/ Joe Ingraham, United States District Judge.

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

INTERVENORS', JOE D. HUGHES, INC. ET AL., COMPLAINT TO SET ASIDE, ANNUL, AND SUSPEND ORDERS OF THE INTERSTATE COMMERCE COMMISSION—Filed March 29, 1956

I.

This action is brought under Section 17(9) of the Interstate Commerce Act (Title 49 U.S.C., Section 17(9)) and

Title 28 U.S.C., Sections 1336, 1398, 2284, 2321, 2322, 2323, 2324, and 2325, and pursuant to Section 10 of the Administrative Procedure Act (Title 5 U.S.C. Section 1009) to set aside, annul, and suspend the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, a proceeding entitled *Pipe—Official and Southern Territories to Southwest,* and to set aside, annul, and suspend the order of the said [fol. 31] Commission dated December 9, 1955, in connection with a related proceeding docketed as Fourth Section Application No. 31120 and entitled *Steel and Wrought Iron Pipe to the Southwest* (said order being designated 26th Supplemental Fourth Section Order No. 17160), and all rate schedules or tariffs published or filed with the said Interstate Commerce Commission in purported compliance with or reliance upon said Orders, all as more fully hereinafter set forth.

II.

1) Intervenor, JOE D. HUGHES, INC., is a corporation organized and existing under the laws of the State of Texas with its principal office at Houston, Texas. It is a certified common carrier by motor vehicle operating under and pursuant to certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the transportation of so-called oilfield commodities within the territorial limits described in its said certificate.

2) Intervenors, HUNSAKER TRUCKING CONTRACTOR, INC., COMBS TRUCK LINE, INC., YOUNGER BROS.-J. M. ENGLISH TRUCK LINES, INC., SOUTHWEST OILFIELD TRANSPORTATION CO., and PRATHER TRUCK LINE, INC. are each and all corporations organized and existing under the laws of the State of Texas with their respective principal offices in Houston, Harris County, Texas, with the exception of intervenor, HUNSAKER TRUCKING CONTRACTOR, INC., whose principal office is located in Dallas, Texas, but it maintains an office and terminal facilities in Houston, Harris County, Texas. That each and all of said intervenors are common carriers by motor vehicle operating under and pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission to each authoriz-

[fol. 32] ing the transportation of so-called oilfield commodities within the territorial limits described in the respective certificates issued to each.

III.

The United States of America is made defendant herein pursuant to the provisions of Title 28 U.S.C.A. Section 2322.

IV.

Intervenors herein transport commodities for the oil and gas industry by motor vehicle between the various oil producing states in the United States including Texas, Louisiana, Oklahoma, New Mexico, Mississippi, Arkansas, Kansas, as their respective operating Certificates of Public Convenience and Necessity may permit. That a most substantial portion of the commodities which they transport consists of pipe for the oil and gas industry and a great proportion of the pipe which they so transport has first been transported from manufacturing areas in the Eastern United States by the plaintiff common carrier barge lines. The transportation of pipe has for many years been a most essential and important part of the traffic of these intervenors and produces revenues which are essential to their financial stability and to their continued ability to provide adequate motor carrier service to the oil and gas industry as presently authorized under their Certificates of Public Convenience and Necessity.

V.

Intervenors adopt by reference pursuant to Rule 10(c) (28, U.S.C.A. #10(c)) those paragraphs numbered V and [fol. 33] VI in plaintiffs' complaint filed herein. In lieu of paragraph VII of plaintiffs' complaint these intervenors allege that upon receipt of a telegram from Hon. H. D. McCoy, Secretary, Interstate Commerce Commission, dated Friday, December 9, 1955, at 5:01 P. M. and delivered on Saturday, December 10, 1955, stating that the Commission had voted to vacate "I. & S. 6491 as of December 17 but to continue the investigation", these intervenors thereupon

petitioned the Commission by telegram and by letter petition, both dated December 13, 1955, requesting the stay of such vacating order pending reconsideration by the Commission and pending completion of the ordered investigation.

VI.

Intervenors further adopt by reference pursuant to Rule 10(c) paragraphs VIII, IX, X, XI and XII of plaintiffs' complaint filed herein as fully to all intents and purposes as if copied verbatim herein.

WHEREFORE, intervenors pray:

1) That a court, consisting of three judges, constituted as required by Title 28, U.S.C. Section 2284, be convened, and that process and notice be given to the defendant as required by law.

2) That upon final hearing the court adjudicate, order and decree that the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, and the order of the Commission dated December 9, 1955, granting the relief sought in Fourth Section Application No. 31120, are unlawful, null and void *ab initio* and that they be set aside and that the enforcement thereof be enjoined, annulled and set aside; [fol. 34] and that the use in interstate or foreign commerce of Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and any and all other railroad rate tariffs and schedules which became or were allowed to become effective by reason of the said orders of December 7 and 9, 1955 (to the extent that they publish rates suspended by the Order of October 20, 1955, or rates which are in contravention of Section 4(1) of the Interstate Commerce Act) be prohibited until such time as the Order of October 20, 1955 in Investigation and Suspension Docket No. 6491 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission, and the Interstate Commerce Commission shall have concluded its investigation into the matters and things involved in Fourth Section Application No. 31120 and shall have issued a lawful and valid order thereon.

3) That intervenors be given such other and further relief as may be equitable and proper in the premises.

/s/ John C. Ridley, 2606 Niels Esperson Bldg., Houston 2, Texas, Attorney for Intervenors.

[fol. 35] *Duly sworn to by A. R. Duke*
jurat omitted in printing.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERVENING RAILROADS—Filed March 29, 1956

The intervening railroads listed in Appendix A hereto attached, without waiving their right to file a motion to dismiss at a later time, hereby answer the complaint heretofore filed, stating:

I.

In answer to Paragraph I of the complaint, it is submitted that the Court is without power to review the exercise by the Commission of its administrative discretion with respect to the matters complained of.

II.

In answer to Paragraph II of the complaint, intervening railroads state that they are without knowledge as to the truth of such allegations and therefore neither admit nor deny such allegations.

III.

Intervening railroads admit the allegations of Paragraph III of the complaint.

IV.

In answer to Paragraph IV of the complaint, intervening railroads state that they are without knowledge as to the truth of such allegations and therefore neither admit nor deny such allegations.

[fol. 37]

V.

In answer to Paragraph V of the complaint, intervening railroads admit that (a) Fourth Section Application 31120 was filed with the Interstate Commerce Commission on or about September 16, 1955, (b) that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to be effective October 20, 1955, (c) that petitions for suspension and for denial of fourth-section relief were filed by plaintiffs herein and other parties and that the intervening railroads and others replied thereto, (d) that thereafter the Commission issued orders reproduced as Exhibits 1 and 2 to the complaint herein, (e) that on or about October 26, 1955, the intervening railroads and others filed petitions for reconsideration by the Commission of the Order of the Suspension Board of October 20, 1955 and for immediate issuance of the authority sought in Fourth Section Application No. 31120, and (f) that Waterways Freight Bureau filed a reply document.

Intervening railroads deny all other allegations in Paragraph V of the complaint.

VI.

In answer to Paragraph VI of the complaint, intervening railroads admit that the Interstate Commerce Commission issued the orders reproduced as Exhibits 3 and 4 to the complaint herein.

Intervening railroads deny all other allegations in Paragraph VI of the complaint.

[fol. 38]

VII.

In answer to Paragraph VII of the complaint, intervening railroads admit that certain petitions were tendered to the Interstate Commerce Commission seeking reconsidera-

tion or review of appellate action of Division 2 of the Commission.

Intervening railroads deny all other allegations in Paragraph VII.

VIII.

In answer to Paragraph VIII of the complaint, intervening railroads admit that the Interstate Commerce Commission issued certain notices reproduced as Exhibits 5 and 6 to the complaint, but deny that the notice reproduced as Exhibit 5 was dated December 5, 1955, as alleged by plaintiffs.

Intervening railroads deny all other allegations in Paragraph VIII.

IX.

Intervening railroads deny the allegations of Paragraph IX of the complaint.

X.

In answer to Paragraph X of the complaint, intervening railroads admit that Section 4(1) of the Interstate Commerce Act prohibits the charging of higher rates for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, provided that the Interstate Commerce Commission may in special cases and after investigation grant relief from such prohibition.

Intervening railroads deny all other allegations in Paragraph X of the complaint.

[fol. 39]

XI.

In answer to Paragraph XI of the complaint, intervening railroads admit the accuracy of the quoted extracts from the orders referred to, and deny all other allegations.

XII.

Intervening railroads deny the allegations of Paragraph XII of the complaint, and assert that the relief sought by

plaintiffs, if granted, would result in severe and irreparable injury to intervening railroads.

WHEREFORE, intervening railroads pray that the relief sought by plaintiffs be denied and that the complaint be dismissed.

/s/ Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas

Edwin N. Bell, Baker, Botts, Andrews & Shepherd, 1600 Esperson Bldg., Houston 2, Texas

Robert H. Bierma, 652 Union Station, Chicago 6, Illinois

Harry E. Boe, LaSalle Street Station, Chicago 5, Illinois

Robert G. Boes, 3016 Terminal Tower, Cleveland, Ohio

Ralph M. Buzek, 1315 Union Central Life Bldg., Cincinnati 2, Ohio

J. T. Clark, Midland Bldg., Cleveland 15, Ohio

William E. Davis, 114 W. 11th St., Kansas City 5, Missouri

[fol. 40] Harvey Huston, 1211 Railway Exchange Bldg., Chicago 4, Illinois

William R. McDowell, Texas and Pacific Bldg., 1025 Elm St., Dallas, Texas

Richard J. Murphy, 1225 LaSalle Street Station, Chicago, Illinois

Walter G. Treanor, Missouri Pacific Bldg., St. Louis, Missouri

Attorneys for Intervening Railroads.

[fol. 41] APPENDIX A TO ANSWER

The intervening railroads are as follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company

[fol. 42] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF WABASH RAILROAD COMPANY—
Filed March 29, 1956

Wabash Railroad Company, intervening as a defendant herein, without waiving its right to file a motion to dismiss at a later time, hereby answers the complaint heretofore filed, stating:

I

In answer to Paragraph I of the complaint, it is submitted that the Court is without power to review the exer-

cise by the Commission of its administrative discretion with respect to the matters complained of.

II

In answer to Paragraph II of the complaint, Wabash Railroad Company states that it is without knowledge as to the truth of such allegations and therefore neither admits nor denies such allegations.

III

Wabash Railroad Company admits the allegations of Paragraph III of the complaint.

IV

In answer to Paragraph IV of the complaint, Wabash Railroad Company states that it is without knowledge as to the truth of such allegations and therefore neither admits nor denies such allegations.

[fol. 43]

V

In answer to Paragraph V of the complaint, Wabash Railroad Company admits that (a) Fourth Section Application 31120 was filed with the Interstate Commerce Commission on or about September 16, 1955, (b) that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to be effective October 26, 1955, (c) that petitions for suspension and for denial of fourth-section relief were filed by plaintiffs herein and other parties and that interested railroads replied thereto, (d) that thereafter the Commission issued orders reproduced as Exhibits 1 and 2 to the complaint herein, (e) that on or about October 26, 1955, interested railroads filed petitions for reconsideration by the Commission of the Order of the Suspension Board of October 20, 1955 and for immediate issuance of the authority sought in Fourth Section Application No. 31120, and (f) that Waterways Freight Bureau filed a reply document.

Wabash Railroad Company denies all other allegations in Paragraph V of the complaint.

VI

In answer to Paragraph VI of the complaint, Wabash Railroad Company admits that the Interstate Commerce Commission issued the orders reproduced as Exhibits 3 and 4 to the complaint herein.

Wabash Railroad Company denies all other allegations in Paragraph VI of the complaint.

VII

In answer to Paragraph VII of the complaint, Wabash Railroad Company admits that certain petitions were tendered to the Interstate Commerce Commission seeking reconsideration or review of appellate action of Division [fol. 44] 2 of the Commission.

Wabash Railroad Company denies all other allegations in Paragraph VII.

VIII

In answer to Paragraph VIII of the complaint, Wabash Railroad Company admits that the Interstate Commerce Commission issued certain notices reproduced as Exhibits 5 and 6 to the complaint, but denies that the notice reproduced as Exhibit 5 was dated December 5, 1955, as alleged by plaintiffs.

Wabash Railroad Company denies all other allegations in Paragraph VIII.

IX

Wabash Railroad Company denies the allegations of Paragraph IX of the complaint.

X

In answer to Paragraph X of the complaint, Wabash Railroad Company admits that Section 4(1) of the Interstate Commerce Act prohibits the charging of higher rates for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, provided that the Interstate Commerce Commission may in special cases and after investigation grant relief from such prohibition.

Wabash Railroad Company denies all other allegations in Paragraph X of the complaint.

XI

In answer to Paragraph XI of the complaint, Wabash Railroad Company admits the accuracy of the quoted extracts from the orders referred to, and denies all other allegations.

[fol. 45] XII

Wabash Railroad Company denies the allegations of Paragraph XII of the complaint, and asserts that the relief sought by plaintiffs, if granted, would result in severe and irreparable injury to Wabash Railroad Company.

WHEREFORE, Wabash Railroad Company prays that the relief sought by plaintiffs herein be denied and that the complaint be dismissed.

Palmer Hutcheson, Jr., Hutcheson, Taliaferrro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas

Eugene S. Davis, Railway Exchange Bldg., St. Louis 1, Missouri

Attorneys for Wabash Railroad Company.

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION AND NOTICE OF MOTION OF THE INTERSTATE COMMERCE COMMISSION FOR LEAVE TO INTERVENE—Filed April 13, 1956

Pursuant to Rule 24 of the Rules of Civil Procedure, the Interstate Commerce Commission moves for leave to intervene as a party defendant in this action in order to assert the claims and defenses which it deems necessary in support of its action, on the ground that it is entitled to

intervene on its own motion and as of right (28 U.S.C. 2323).

Interstate Commerce Commission, Robert W. Ginnane, General Counsel, H. Neil Garson, Assistant General Counsel

[fol. 47] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 48] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF INTERSTATE COMMERCE COMMISSION AS DEFENDANT—April 13, 1956

The Court having considered the motion of the Interstate Commerce Commission for leave to intervene as a party defendant in the above cause, and it appearing to the Court that the said Interstate Commerce Commission should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, That the Interstate Commerce Commission have leave to intervene in this cause and is hereby made a party defendant, and to that end may file its answer and hereafter defend its order involved herein in the same manner and with like effect as if named as an original party.

Dated, April 13, 1956.

/s/ Joe Ingraham, United States District Judge

[fol. 49] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT—Filed April 13, 1956

The Interstate Commerce Commission, hereinafter referred to as the Commission, for answer to the complaint says:

1.

Answering paragraph I, the Commission admits that plaintiffs seek to set aside, annul and suspend the orders of the Commission complained of, except that it avers that the Court is without jurisdiction to review the orders of the Commission in said paragraph.

2.

Admits the allegations of paragraph II.

3.

Admits the allegations of paragraph III.

4.

Answering paragraph IV, the Commission is without knowledge as to the truth of the allegations contained therein regarding the transportation by barge of commodities in single or interline service between the areas designated therein. Therefore, it neither admits nor denies said al-
[fol. 50] legations. The Commission avers that so much of paragraph IV, which alleges that the transportation of pipe between such areas is an important part of plaintiffs' traffic and revenue, is argumentative in nature to which no answer is required.

5.

Admits that Fourth Section Application No. 31120 was filed with the Commission on or about September 16, 1955, that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to become effective on October 26, 1955; that plaintiffs and interested parties filed petitions for suspension of the rate schedules and to deny Fourth Section relief; that responses were filed thereto by interested rail carriers; that the matter of the protest against the rates was referred to the Board of Suspension of the Commission and the application for relief was referred to the Fourth Section Board of the Commission; that the Commission entered the orders reproduced as Exhibits 1 and 2 to the complaint; that on or about October 26, 1955, interested rail carriers filed petitions for reconsideration by the Commission of the order of the Board of Suspension entered October 20, 1955, and for immediate issuance of the authorities sought in Fourth Section Application No. 31120; and that a reply was filed by Waterways Freight Bureau.

The Commission denies each and every allegation contained in paragraph V not admitted hereinabove.

6.

Admits that the Commission, Division 2, acting as an appellate division, entered the order of December 7, 1955, vacating the order of the Board of Suspension of October 20, 1955, in I. & S. No. 6491, insofar as the rate schedules therein were suspended. The Commission avers that said order of December 7, 1955, continued in full force and effect [fol. 51] that portion of the order of the Board of Suspension requiring an investigation of the rate schedules. The Commission further avers that a corrected order was entered, bearing the same date, further setting forth fully the reasons for vacating its prior order of suspension entered October 20, 1955. The Commission admits the entry of an order on December 9, 1955, in Fourth Section Application No. 31120, except that it avers that a corrected order of the same date has been entered setting forth that the action was taken by the Commission, Division 2, acting as an appellate division.

The Commission denies each and every allegation not admitted above.

7.

Denies the allegations of paragraph VII, except that it admits the filing of the petition mentioned in said paragraph.

8.

Denies the allegations of paragraph VIII, except that it admits the issuance of the notices reproduced as Exhibits 5 and 6 to the complaint. The Commission further denies that it issued the notice reproduced as Exhibit 5 on December 5, 1955. The Commission avers that said notice was issued on December 15, 1955.

9.

Denies the allegations of paragraph IX.

10.

Admits so much of paragraph X which quotes the provisions of Section 4(1) of the Interstate Commerce Act (49 U.S.C. Sec. 4(1)). The Commission avers that the other allegations of paragraph X are argumentative in nature to which no answer is required.

[fol. 52] 11.

Admits so much of paragraph XI which quotes sections of the Commission's orders reproduced as Exhibit 3 and Exhibit 1 of the complaint. The Commission denies each and every other allegation of this paragraph.

The Commission avers that a corrected order entered December 7, 1955, sets forth fully the reasons for vacating the order of suspension.

12.

Denies the allegations of paragraph XII.

Except as expressly admitted herein, the Commission denies each and all of the allegations in said complaint to

the extent that they are inconsistent with the averments of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By: H. Neil Garson, Assistant General Counsel.

Robert W. Ginnane, General Counsel, Of Counsel.

[fol. 53] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT TO THE COMPLAINT OF JOE D. HUGHES, INC., ET AL.—Filed April 13, 1956

The Interstate Commerce Commission, one of the defendants in the above-styled proceeding, for answer to the complaint filed by Joe D. Hughes, Inc., et al, intervening complainants, states:

1.

Admits the allegations of paragraph II.

2.

Answering paragraph IV, the Commission is without knowledge as to the truth of the allegations contained therein regarding the transportation by motor carrier of pipe between the areas designated therein. Therefore, it neither admits nor denies said allegations. The Commission avers that so much of paragraph IV which alleges that the transportation of pipe between such areas is an important part of intervening complainants' traffic and revenue, is argumentative in nature to which no answer is required.

3.

Admits the allegations of paragraph V.

[fol. 55] 4.

The Commission adopts by reference, pursuant to Rule 10(c) of the Federal Rules of Civil Procedure (28 U.S.C.A. Sec. 10(c)), the answers set forth in its answer to the plaintiffs' complaint not hereinabove specifically replied to.

Interstate Commerce Commission, By: H. Neil Garson, Assistant General Counsel.

Robert W. Ginnane, General Counsel, Of Counsel.

[fol. 56] Certificate of Service (omitted in printing)

[fol. 57] [File endorsement omitted]

In United States District Court for the Southern District of Texas, Houston Division

[Title omitted]

Answer of the United States of America to Complaint—Filed April 13, 1956

Comes now the defendant, the United States of America, and for its answer to the complaint filed in the above-entitled cause, admits, denies and avers as hereinafter set forth:

1. Denies the allegations of Paragraph I of the complaint.

2. Answering the allegations of Paragraph II of the complaint, the defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore neither admits nor denies the same.

3. Answering the allegations of Paragraph III of the complaint, the defendant respectfully refers the Court to

Section 2322 of Title 28, United States Code, for an accurate statement of the provisions of said Section 2322.

4. Answering the allegations of Paragraph IV of the complaint, the defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore neither admits nor denies the same.

[fol. 58] 5. Answering the allegations of Paragraph V of the complaint, the defendant admits that Fourth Section Application 31120 was filed with the Interstate Commerce Commission on or about September 16, 1955, that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to be effective October 26, 1955; that plaintiffs and interested parties filed petitions for suspension of the rate schedules and to deny Fourth Section relief; that responses were filed thereto by interested rail carriers; that the matter of the protest against the rates was referred to the Board of Suspension of the Commission and the application for relief was referred to the Fourth Section Board of the Commission; that the Commission entered the orders reproduced as Exhibits 1 and 2 to the complaint; that on or about October 26, 1955, interested rail carriers filed petitions for reconsideration by the Commission of the order of the Board of Suspension entered October 20, 1955, and for immediate issuance of the authorities sought in Fourth Section Application No. 31120; and that Waterways Freight Bureau filed a reply document.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph V of the complaint.

6. Answering the allegations of Paragraph VI of the complaint, the defendant admits that the Interstate Commerce Commission issued the orders reproduced as Exhibits 3 and 4 to the complaint herein. Further answering the allegations of said Paragraph VI of the complaint, the defendant avers that a corrected order of December 7, 1955, was issued by the Interstate Commerce Commission, Division 2, acting as an Appellate Division, wherein the reasons for vacating its order, by the Board of Suspension, of October

20, 1955, in Investigation and Suspension Docket No. 6491, are more fully set forth. Further answering the allegations of said Paragraph VI of the complaint, the defendant avers that a corrected order of December 9, 1955, was issued by the Interstate Commerce Commission, Division 2, acting [fol. 59] as an Appellate Division, setting forth that the action was taken by the Commission, Division 2, acting as an Appellate Division.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph VI of the complaint.

7. Answering the allegations of Paragraph VII of the complaint, the defendant admits that certain petitions were tendered to the Interstate Commerce Commission seeking reconsideration or review of appellate action of Division 2 of the Commission.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph VII of the complaint.

8. Answering the allegations of Paragraph VIII of the complaint, the defendant admits that the Interstate Commerce Commission issued certain notices reproduced as Exhibits 5 and 6 to the complaint, but denies that the notice reproduced as Exhibit 5 was dated December 5, 1955, as alleged by plaintiffs.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph VIII of the complaint.

9. Denies the allegations of Paragraph IX of the complaint.

10. Answering the allegations of Paragraph X of the complaint, the defendant respectfully refers the Court to Section 4(1) of Title 49, United States Code, for a full and accurate statement of the provisions of said Section. As to all other allegations of said Paragraph X of the Complaint, the defendant avers that they are argumentative, irrelevant, immaterial, include conclusions of law and fact, and require no answer, but; to the extent that they may include facts which may require an answer, they are denied.

11. Answering the allegations of Paragraph XI of the complaint, the defendant admits the accuracy of the quoted extracts from the orders referred to therein. Further answering the allegations of said Paragraph XI of the complaint, the defendant avers that a corrected order of December 7, 1955, was issued by the Interstate Commerce Com- [fol. 60] mission, Division 2, acting as an Appellate Division, wherein the reasons for vacating its order, by the Board of Suspension, of October 20, 1955, in Investigation and Suspension Docket, No. 6491, are more fully set forth.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph XI of the complaint.

12. Answering the allegations of Paragraph XII of the complaint, the defendant denies that the Interstate Commerce Commission has acted arbitrarily and capriciously, and contrary to any applicable statute. Further answering the allegations of said Paragraph XII of the complaint, the defendant avers that all other allegations therein are argumentative, include conclusions of law and fact, and require no answer.

13. The defendant further avers that the orders and actions of the Interstate Commerce Commission here under attack are valid and lawful in all respects, and denies each and every allegation to the contrary set forth in the complaint; and, except as herein expressly admitted, the defendant denies each and all of the allegations in the complaint.

WHEREFORE, having fully answered, the defendant, the United States of America, prays that the relief sought in the complaint be denied and that the complaint be dismissed with costs assessed against the plaintiffs, and it have such other, further and different relief as to the Court may seem just and equitable in the premises.

/s/ James E. Kilday, /s/ John H. Earle, Attorneys, Department of Justice.

Stanley N. Barnes, Assistant Attorney General, Malcolm R. Wilkey, United States Attorney, Attorneys for Defendant, United States of America, By: Gordon Kroll, Ass't U. S. Atty.

[fol. 61] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 62] IN UNITED STATES DISTRICT COURT

NOTICE OF SETTING OF HEARING FOR MAY 18, 1956

Houston, Texas, April 13, 1956

Dixie Carriers, Inc. et al. v. United States, et al. C. A. 9544, Houston Division.

To ALL COUNSEL OF RECORD:

The above entitled and numbered cause will be heard in the courtroom at Houston, Texas, before Circuit Judge Brown and District Judges Hannay and Ingraham on Friday, May 18, 1956, at 10:00 A.M.

Briefs will be filed by all parties not later than Friday, May 11, 1956.

Parties Plaintiff will be allowed one hour and thirty minutes within which to present their arguments, and Parties Defendant will be allowed one hour and thirty minutes within which to present their arguments. Parties Plaintiffs and Defendants, respectively, will agree among themselves upon the division of time.

The court this day granted the motion of the Interstate Commerce Commission to intervene as a Party Defendant.

Yours very truly, V. Bailey Thomas, Clerk, By: /s/ Albert E. Anderson, Deputy Clerk.

[fol. 63] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, UNION BARGE LINE CORPORATION, JOHN I. HAY COMPANY, COYLE LINES INCORPORATED, FEDERAL BARGE LINES, INC., WATERWAYS FREIGHT BUREAU, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

OPINION—Filed July 31, 1956

Before BROWN, Circuit Judge, HANNAY and INGRAHAM, District Judges.

BROWN, Circuit Judge:

Involving the vacating of an Order suspending proposed rates, this case[1] is a parallel of *Amarillo-Borger Express* v. *United States* (N.D.Tex.-three-Judge), 138 F.Supp. 411, and the variation in *The Long Island Railroad Company* v. *United States* (E.D.N.Y.-three-Judge), 140 F.Supp. 823, expressly approving it. We too, without the necessity of restating the matter so fully developed there, adopt the opinion, conclusion and reasoning of that case. The only substantial factual difference is that here the proposed rates required express Section Four approval by the Commission under the Long and Short Haul provision, 49 USCA 4(1) of the National Transportation Act, 49 USCA 1 et seq.

[1] Complaint filed February 16, 1956, by eight specified, certificated Water Carriers and Waterways Freight Bureau to set aside orders of the Interstate Commerce Commission, 49 USCA 17(9); 28 USCA 1336, 1398, 2284, 2321 to 2325; and Section 10 of the Administrative Procedure Act, 5 USCA 1009.

The Railroads, to regain a competitive position lost to interstate Water and Motor Carriers largely as the result, they claimed, of voluntary *ex parte* increases (Ex Parte [fol. 64] 162, 166, 168, 175) in railroad rates, on September 19, 1955, published (to become effective October 26, 1955) drastic reductions in their rates for the movement of steel and wrought-iron pipe, in carloads, moving from the mills in the industrial areas East of the Mississippi River to destinations in the States of Arkansas, Louisiana, Oklahoma and Texas. Concealed in the lexicography of the complex tariff papers is the battle for transportation revenues running annually, it is asserted, from $6,000,000.00 to $9,000,000.00 and constituting about 15% of water carrier revenues for the movement of fabricated steel pipe for current and immediate use in the oil fields and for pipeline transmission facilities in the great Southwest.

This case does not involve the question of the extent of the right, so often asserted by the Railroads, as a part of management responsibility to publish reduced rates to meet competition, see *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, M.D.Ala., 104 F.Supp. 193, 198, and which would, subject only to the possibility of suspension for a seven months period under 49 USCA 15(7), make them effective until determined by hearing to be unlawful. For here, by the choice of the Railroads, the proposed rates were less for the longer distance from the steel mill areas to rail-head delivery points in the Southwest than rates for the movement of the same commodity for shorter distances within both origin and destination territories. They were thus confessedly in violation of the Act[2] *unless*, upon ap-

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[2] Sec. 4 [as amended June 18, 1910, February 28, 1920, August 9, 1935, September 18, 1940], 49 USCA 4: "'(1) It shall be unlawful for any common carrier subject to this part or Part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance • • •: *Provided*, That upon application to the Commission such common carrier may in *special cases, after investigation*, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; • • •,

plication and after investigation by the Commission finding it to be a special case, and the rates reasonably compensatory for the services performed, express approval were given.

[fol. 65] Consequently, as permitted by the Act, the Railroads simultaneously filed (September 19, 1955) Fourth Section Application No. 31120 for approval of the rates. But until the Fourth Section Application was granted, the rates could not go into effect. Conversely, so long as they were suspended, they could not be effective and approval under Fourth Section would be a sterile, useless academic decision.

Water and Motor Carriers then filed Protests against Fourth Section approval and Petitions for Suspension, each of which normally are administratively handled by separate Boards[3] of Commission employees. On October 20, 1955, the Suspension Board, on positive findings[4] iden-

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but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is *not reasonably compensatory* for the service performed; • • •." [Italics supplied]

[3] 49 USCA 17(2). The suspension proceeding was identified as I & S [Investigation and Suspension] Docket No. 6491. Fourth Section approval was under FSA 31120.

[4] The Order October 20, 1955, in 6491 stated (numbers in [ ] added to identify stated reasons for action):

> "*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be [1] unjust and unreasonable in violation of the Interstate Commerce Act and [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy and [3] be in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority • • •."

In two "corrected" orders later entered but bearing the same date occasioned by technical errors in tariff descriptions, the phrase "in contravention of the National Transportation Policy" was inadvertently omitted from finding [2] so that [2] read, "and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 • • •."

tical with *Amarillo-Borger*, supra, ordered an investigation into the lawfulness of the rates, and suspended them for the full seven months to May 25, 1956. With the rates suspended, there was nothing which the I & S Board could do on FSA 31120.

[fol. 66] The Railroads, presumably accepting the findings, note 4, supra, as an adequate, articulate "statement in writing of [the Commission's] reasons for such suspension" [5] since no complaint by them has yet been made, filed on October 26, 1955, a Petition in I & S 6491 for reconsideration of the suspension order and, on the same day, filed in FSA 31120 a "Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Application herein, dated September 16, 1955." This was not [6] a Peti-

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The Railroads (see their brief pages 31, 32, footnote 1) find significance in this omission, but the last "corrected" order of December 7, 1955, entered March 2, 1956, note 13, infra, restating the negative of findings [1], [2], and [3] completely dispels this.

[5] 49 USCA 15(7): "Whenever there shall be filed with the Commission any schedule stating a new • • • rate • • • the Commission shall have • • • authority • • • to enter upon a hearing concerning the lawfulness of such rate • • •; and pending such hearing and the decision thereon the (..ission, upon • • • delivering to the • • • carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such • • • rate • • • but not for a longer period than seven months beyond the time when it would otherwise go into effect • • •."

[6] No Order of any kind was ever entered or served in FSA 31120 until the Order of December 9, 1955. While an undisclosed Minute Entry of the Fourth Section Board, 21 October 1955, states, "Voted to withhold relief pending hearing, and to assign the above application for hearing with I & S, No. 6491", it is of no consequence as no action was, or could then have been, taken and to be effective, it must have been communicated to interested parties affected by it, 49 USCA 14(1)(2), 17(5); 5 USCA 1002, which was not done.

The Railroads' Petition FSA 31120 itself reflects this: "As the Suspension Board suspended the involved rates, the question of issuing Fourth Section authority at this time became moot and the Fourth Section board has *neither granted nor denied* the Railroads' application. However, as a petition for vacation of the order of suspension is filed concurrently, the question is *revived* and this petition is therefore filed • • •" [Emphasis supplied]

tion for reconsideration and those preparing and proposing it treated it as a Petition for initial action on the original Fourth Section Application.

[fol. 67] Through Commission administrative channels the Petition for Reconsideration of the Suspension Order came before Division 2 acting as an appellate division. On December 7, 1955, by an Order[7] in all respects identical with that roundly condemned in *Amarillo-Borger*, supra, the Suspension Order was vacated, and on December 9, 1955, an order of ambiguous[8] origin was entered granting temporary Fourth Section relief effective December 17, 1955.

[fol. 68] The Water and Motor Carriers then filed separate Petitions for Reconsideration of the Orders of December 7 and 9 requesting in those Petitions the Stay

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The Prayer stated: "Wherefor- these applicants pray that this Commission issue appropriate Fourth Section authority sought by Fourth Section Application No. ICC 31120."; and compare this with the document filed simultaneously in I & S 6491, denominated a "Petition • • • for Reconsideration" and opens, "Come now the railroads in • • • I & S 6491 and petition this Honorable Commission for *reconsideration* of the Order of the Suspension Board • • •." [Emphasis supplied]

[7] I & S 6491, December 7, 1955: "*It further appearing*, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; *and good cause appearing therefor*: • • •" See note 6, Amarillo-Borger, 138 F. Supp. at 414, 415.

[8] The actual order, made on December 9, as served December 29, 1955, showed at its heading: "At a session of the Interstate Commerce Commission, Division 2, acting as an Appellate Division • • •" but closed: "By the Commission, Fourth Section Board. Harold D. McCoy, Secretary."

A corrective order dated December 9, 1955, was entered March 2, 1956, after this case had been assigned to this Three-Judge Court. It deleted reference to the Fourth Section Board and substituted: "By the Commission, Division 2, acting as an Appellate Division."

By a still later order purporting to be entered December 16, 1955, but actually entered April 27, 1956, this was again changed by reciting that the order of December 9, 1955, was by Division 2 "acting as an Appellate Division, upon consideration of a petition by respondents requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section application No. 31120, • • • be reversed • • •."

granted by the Act[9] where the initial Order is handed down by a Board or Division. By notice dated December 15, 1955, the full Commission declined to act and on the following day, December 16, notice and order were issued[10] denying the Petitions in I & S 6491.

[fol. 69] Thus the matter stood when, on February 16, 1956, this verified complaint was filed. And on that record, we are of the clear opinion that the Order of December 7, vacating the prior suspension, is invalid. The simple phrase "and good cause appearing therefor" is inadequate to upset prior positive findings, and for the reasons[11] set forth in

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[9] 49 USCA 17(8): "Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

[10] The notice, December 15, 1955, is captioned I & S 6491 and refers to "Petitions * * * seeking reconsideration * * * by the Commission of appellate action of Division 2 in which the Division modified the action of the Board of Suspension." This was merely a ruling that the Petitions would be considered by the appropriate appellate division pursuant to Item 8.4 Organization Minutes of the Commission 20 Fed. Reg. 5031, 5035, and Rule 101(g).

The notice, December 16, and formal order of the same date likewise refer solely to I & S 6491 and the order, December 7, 1955, vacating the prior order, October 20, 1955, suspending the rates.

[11] The Court summed it up this way 138 F. Supp. at pages 417 and 420:

> "But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, 'and good cause appearing therefor.'
>
> "If the cryptic phrase 'good cause appearing' is a sufficient indication of action, it will be a self-generating bar to any

Amarillo-Borger cannot, on judicial review,[12] stand.

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review since, 'the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based,' Securities and Exchange Comm. v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454, 459, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a 'lack of the basic or essential findings required to support the Commission's order,' State of Florida v. United States, 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U. S. 454, 465, 55 S. Ct. 268, 79 L. Ed. 587; Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 224, 71 S. Ct. 264, 95 L. Ed. 225; Cantlay & Tanzola, Inc. v. United States (D. C. S. D. Calif.) (three-Judge), 115 F. Supp. 72; State of North Carolina v. United States, 325 U. S. 507, 65 S. Ct. 12, 60, 89 L. Ed. 1760; Atlanta & St. Andrews Bay Ry. Co. v. United States, D.C., 104 Fed. Supp. 193; Pacific Island Tariff Bureau v. United States, D.C., 129 Fed. Supp. 472. • • •

"What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase 'good cause appearing' to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then; without more than the magic phrase 'good cause appearing,' determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the 'reasons or basis therefor.'"

[fol. 70]

[12] To similar attacks made here, as there, the following may be added to *Amarillo-Borger's* exposition:

(a) Competitors immediately, adversely and financially affected have standing to sue as parties for a review: note 9, *Amarillo-Borger* and Scripps-Howard Radio v. Federal Communications Commission, 316 U. S. 4, 14, 15, 86 L. Ed. 1229, 1236, 1237; National Coal Association v. Federal Power Commission, D.C. Cir., 191 F. 2d 462, 464-466; Associated Indus-

[fol. 71] Nor, do we think, does the matter stand differently

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tries v. Ickes, 2 Cir., 134 F. 2d 694, 699-704; Cia. Mexicana de Gas v. Federal Power Commission, 5 Cir., 167 F. 2d 804, 805.

(b) An Order vacating suspension has adequate finality for review: see, *Amarillo-Borger*, 138 F. Supp. at 420, syllabus 10, 11; Atlantic Seaboard Corp. v. Federal Power Commission, 4 Cir., 201 F. 2d 568; Phillips Petroleum Company v. Federal Power Commission, 10 Cir., 227 F. 2d 470; for reviewability is determined by the intrinsic nature of the order and its practical impact upon the business under regulation and not by the mere tag or label affixed to it: Columbia Broadcasting System v. United States, 316 U. S. 407, 86 L. Ed. 1563; Frozen Food Express v. United States, 351 U. S. 40, —— L. Ed. ——; United States v. Storer Broadcasting Company, 351 U. S. 192, —— L. Ed. ——.

(c) Administrative Procedure Act, 5 USCA 1001 et seq., applies to I.C.C. proceedings: *Amarillo-Borger*, supra, 138 F. Supp. at 417; Coyle Lines v. United States, E. D. La., 115 F. Supp. 272, 275; Atlanta and Saint Andrews Bay Railway Co. v. United States, 104 F. Supp. 193 at 200; Chicago & E. I. R. Co. v. United States, S. D. Ind., 107 F. Supp. 118, 124. Section 8 (5 USCA 1007) applies for suspensions and temporary approval of Fourth Section applications are integral parts of investigations on the lawfulness of rates which must, of course, be determined upon hearings, see, e.g., 49 USCA 15(1) "whenever, after a full hearing • • •"; 15(7) "• • • the Commission shall have authority • • • to enter upon a hearing concerning the lawfulness • • •"; so that, while prescribing rates is so-called "rule making" under Section 1 (5 USCA 1001), the substantive statutes requiring the hearing thereby invoke Section 4 (5 USCA 1003(b)) and Section 7 (5 USCA 1006). The Transportation Act likewise requires full adequate statement of Commission action, 49 USCA 14(1)(2); 17(5).

(d) That the granting or denial of suspensions requires the Commission to exercise sound judgment and discretion does not under Section 10, Administrative Procedure Act, 5 USCA 1009, class suspension orders as nonreviewable: *Amarillo-Borger*, supra, 138 F. Supp. at 418, note 13; commenting on the legislative history (summarized note 13, *Amarillo-Borger*), the Supreme Court stated, Heikkila v. Barber, 345 U. S. 229, 231, 97 L. Ed. 972, 976: "The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that §10 greatly expanded the availability of judicial review • • •". The Court's purpose to apply the Administrative Procedure Act to reinvest in Courts the full power and responsibility of

because of subsequent efforts[13] of the Commission to indicate that it had in fact met the teachings of that case. This was not a permissible *nunc pro tunc* order correcting clerical, ministerial errors or omissions. It was an attempt to substitute reasons where none had appeared[14] or been re- [fol. 72] corded. Moreover, we agree with *Long Island Railroad Company, supra,* 140 F.Supp. 823 at 828 (in which, at the very same time, March 1, 1956, a similar

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the Judiciary, Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474, 95 L. Ed. 456, is reflected in Shaughnessy v. Pedreiro, 349 U. S. 48, 51, 52, 99 L. Ed. 868, 873, declining to forbid judicial review under the 1952 Immigration Act: "Such a restrictive construction • • • would run counter to §10 and §12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action • • •. It is more in harmony with the generous review provisions of the Administrative Procedure Act • • •." "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed • • • ", Marcello v. Bonds, 349 U. S. 302, 310, 99 L. Ed. 1107, 1116; Air Line Dispatchers Association v. National Mediation Board, D.C. Cir., 189 F. 2d 685, 688, 689; Ford v. United States, 5 Cir., 230 F. 2d 533, 534.

[13] On March 2, 1956, a "corrected order" of December 7, 1955, in I & S 6491 was entered, substituting for the "and good cause appearing" paragraph of that original order, note 7, supra, the following (numbers in [ ] corresponding to the initial stated reasons, see note 4, supra, are added):

> "*It further appearing,* That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by [lists 5 protestants] thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not [1] result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy or [3] be in contravention of the provisions of section 4 of the Interstate Commerce Act; • • •."

[14] The Minute Entry, Division 2, Appellate Division, I & S 6491, December 7, 1955, merely states: "Voted to grant the petition to vacate the order of suspension but to continue the proceeding of investigation."

"corrected order" was entered), applying *Amarillo-Borger* that in the face of positive, strong findings of probable illegality merely to restate the conclusion in negative form is inadequate. We do not regard this in a technical light at all. If administrative agencies, no matter how highly motivated their particular action may be, can, under the form of *nunc pro tunc* corrective orders, presumably "correct" the subject order to meet the objections specifically urged in a petition for judicial review, effective review would be denied. The vice of the "and good cause appearing" technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action. That is compounded if, on a challenge, review is then thwarted by substituting something else. There is no way to tell whether, in the processes of deliberation and adjudication, the Division meant "and good cause appearing" to be the negative of the initial suspension findings or something different. Whatever it was, "these suitors were justly entitled to a recital of what it was that indicated the disappearance of the prima facie case, and the necessity for an investigation, namely, that the announced result was the exercise of a discretion based upon sound reasoning", *Long Island Railroad Company, supra,* 140 F. Supp. 823 at 828.

The order of December 7, 1955, vacating the suspension must therefore be set aside, and the matter remanded to the Commission for further and not inconsistent proceedings. The question is not the simple one of a suspension beyond the statutory maximum of seven months (expired May 25, 1956) for this is all intertwined[15] with the Fourth

[15] It is plain that all of the action was interdependent. E.g., the initial oral hearing October 17, 1955, was before a joint session of the Suspension and Fourth Section Boards; the Fourth Section Application was in abeyance as long as the rates were suspended; and the order of December 7, 1955, whether considered as impliedly finding the negative of reason [3] of the Suspension Order (note 4, supra) or expressly doing so by the "corrected order" of March 2, 1956 (note 13, supra) in holding that said schedules would not "* * * be in contravention of the provisions of section 4 of the Interstate Commerce Act" was a statement patently wrong *unless* it was certain that such rates had been approved as a "special case" under 49 USCA 4.

Section Application. And rates which have been approved under the Fourth Section Application which would not, and could not, have been effectually determined so long as the rates were suspended, must resume their former status.

[fol. 73] That leads us to the plaintiffs' further contention that under these circumstances the Order of December 9, 1955, approving the Fourth Section Application is invalid. In this they contend that *temporary* approval (i.e., pending a hearing) is not authorized by the statute and is hence ineffective. But this is a point we need not decide.

As in the case of suspensions, we are not at this time claiming or exercising the existence of a power to determine whether the proposed rates were a "special" case meriting approval. We are concerned with the narrower, but still important, question of whether the procedures thus far followed by the Commission are in accordance with law.

Assuming, *arguendo,* that temporary relief may be granted and that the "investigation" required by Section 4 to permit that temporary relief need not be the full dress adversary hearing required before final determination of the lawfulness of the proposed rates, we think there must be some determination and disclosure of the basic reasons why temporary relief is granted. Unless this is done, there is no way for those immediately affected—e.g., "short haul" shippers who pay higher rates, intermediate communities, or competing carriers—[16] to ascertain whether

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[16] It would be unrealistic if, as claimed by the Railroads, competing carriers whose economic life is imperiled. Columbia Broadcasting System v. United States, supra; United States v. Storer Broadcasting Company, supra; Frozen Food Express v. United States, supra, have no standing to invoke review. They have ample standing, see note 12, supra; and at least two (see (2) and (3) of the criteria, Transcontinental Cases of 1922, 74 ICC 48, 71, which applicants must affirmatively meet to satisfy the underlying requirement of a "reasonably compensatory" rate expressly deal with the affect on competitors:

> "In the light of these and similar considerations, we are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not to be so low as to threaten the

action having a devastating potential is the product of [fol. 74] reason and judgment within the mandate of the National Transportation Policy to "recognize and preserve the inherent advantages of each" mode of transportation and preserve a "national transportation system by water, highway and rail * * * adequate to meet the needs of the commerce of the United States * * *" or is, on the other hand, hasty, ill-considered action creating undue and illegal preferences.

Nor is there any way for a Court on petition of any such interested and aggrieved parties to test its legality. So-called temporary approval is that in name only for, unlike suspensions which carry a statutory maximum, the Fourth Section approval may continue for many months or years until the investigation[17] hearings are completed and judicial review exhausted. So far as the affected competing carriers are concerned, the approval is a definite, positive act having final characteristics, *Phillips Petroleum Company* v. *Federal Power Commission, supra; Atlantic Seaboard Corporation* v. *Federal Power Commission, supra,*

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extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the act. * * *"

[17] Hearings on the investigation ordered (and never rescinded) by the initial Suspension Order October 20, 1955, note 4, supra, were held early in 1956 and the matter is now awaiting an Examiner's proposed report. Control of timing and presentation at the various stages may be beyond the immediate parties since the matter was heard and is being considered on a consolidated record with cases of Steel Pipe—East to Southwest, Docket No. 31860 and FSA 31860. It may be further complicated since the proposed Fourth Section rates are constructed on the lowest barge and on-carrying motor truck tariffs, a substantial portion of which traffic now moves by motor carriers holding Oil Field Haulers' ICC permits so that, the plaintiffs assert, the ultimate action of the Commission in I & S 6491 may be affected by MCC 1891 General Investigation Oil Field Equipment, Materials, Supplies To and Between the Southwest, which likewise awaits Examiner's report. In either or all of these proceedings, the rules permit exceptions and appeal to the appropriate Division followed by exceptions and Petition for Reconsideration to the Full Commission. The parties, on argument, except to agree that the time would be substantial, were unable to estimate when the final order after final review would become final.

for even though the ultimate decision disapproves the rates and denies the Fourth Section Application, the traffic lost to them in the interim is irretrievable, and no means exists to recoup losses from shippers or the other carriers who have enjoyed the benefit of the Fourth Section rates. [fol. 75] This is in harmony with the philosophy of Section 4 that variations from its sweeping prohibitions are permitted, *Intermountain Rate Cases,* 234 U.S. 476, 58 L.Ed. 1408, only in *special* cases, and then only after investigation affords the basis for a conclusion that it is "special." Before the Commission can permit that which the statute forbids, at least two things must be reflected: (1) that it is a "special" case, and this means something more than a label as such; and (2) that its classification as a special case has been determined by "an investigation"—a very important condition since, "The requirement of section 4 that such authorization shall be made, if at all, 'after investigation' clearly implies that the question shall be determined upon testimony and after a hearing", *Louisville & N.R. Co.* v. *United States,* W.D. Ky (three-Judge), 225 Fed. 571, 580, affd. 245 U.S. 463, 62 L.Ed. 400; and see note 12(c), *supra.* For administrative action permissible only under limited circumstances after satisfying statutory conditions, it is plain that this is the type of situation which Congress had in mind in requiring that "all decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; * * *", Section 8, Administrative Procedure Act, 5 USCA 1007.

This is particularly so where, as here, by strong emphatic language condemning the rates for specific reasons (note [fol. 76] 4, *supra*) and generally as violative of the criteria of *Transcontinental Cases of 1922,* note 16, *supra,* relief is first denied but, without any other or further showing, is then granted. Courts and administrative agencies have, and must have, power to change their minds. But if it is the rule of law which controls, there must be some basis to indicate that it is reason and judgment that has brought about the change.

All of this is aggravated by the fact that this serious question of whether competing water and motor carriers are to be exposed to what they describe as "suicidal" rates for the indefinite period of investigation, has been treated too much as a matter of pure paper form. When the verified complaint and supporting memorandum brief filed here pointed out that these protestants were entitled, 49 USCA 17(8), note 9, *supra*, to a stay of the order of December 9, 1955, (stated to have been issued by the Fourth Section Board, note 8, *supra*) until decision by Division 2, the Commission on March 2, 1956, "corrected" that to make it appear that this was by Division 2 acting as an appellate division. But since Division 2 could act only as an appellate division on a matter *appealed* to it for reconsideration, the Commission then entered, on April 27, 1956, a still further corrected order of December 16 stating, contrary to available record facts (note 6, *supra*) that Division 2 was "acting as an appellate division, upon consideration of a petition by respondents [Railroads] requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section Application No. 31120 * * * be reversed * * * ."

The action of Division 2 was not appellate. It was initial. Pending decision on the petition for reconsideration of that action of December 9, the protestants were entitled to a stay. An order entered months after the judicial review has been set in motion and based on recitations not borne out by the available record does not change it. On the contrary, it dramatizes again the danger, under our system, of circumventing judicial review by claiming to find and then belatedly record that which was known in fact but imperfectly reflected in the official papers.

[fol. 77] The orders appealed from are, therefore, invalid and for the reasons set forth are set aside and the matter remanded to the Commission for further and not inconsistent proceedings.

Reversed and remanded to the Commission.

John R. Brown, United States Circuit Judge.
Allen B. Hannay, United States District Judge.
Joe Ingraham, United States District Judge.

[fol. 80] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT—August 17, 1956
(Filed August 20, 1956)

BE IT REMEMBERED, that on May 18, 1956, in the above-entitled and numbered case wherein Dixie Carriers, Inc., Gulf Canal Lines, Inc., Mississippi Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., and Waterways Freight Bureaus are Complainants; Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros.-J. M. English Truck Lines, Inc., Southwest Oilfield Transportation Co., and Prather Truck Line, Inc. are Intervening Complainants; the United States of America is Defendant; the Interstate Commerce Commission is Intervening Defendant, and the carriers by railroad listed in Appendix A of this Judgment are likewise Intervening Defendants, the trial upon its merits came on regularly to be heard before a Court of three Judges convened pursuant to law. All parties appeared by Counsel and the merits of the case were fully presented and the matter was submitted to the Court.

Thereafter, and on August 1, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed orders are invalid and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which [fol. 81] opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, by the Court that (1) the order of the Interstate Commerce Commission entered on December 7, 1955, in its Investigation and Suspension Docket No. 6491, and as subsequently amended by corrective order bearing the same date, and (2) the order of the Interstate Commerce Commission entered on December 9, 1955, responsive to Fourth Section Application No. 31120, identified as Twenty-Sixth Supplemental Fourth Section Order No. 17160, and as amended by corrective order bearing the same date, be, and the same are hereby, declared to be invalid, and said orders are hereby set aside and their enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the matter out of which the enjoined orders arose, be, and the same is hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings.

RENDERED AND DONE this 17 day of August 1956.

For the Court

/s/ John R. Brown, United States Circuit Judge
/s/ for Allen B. Hannay, United States District Judge
/s/ for Joe Ingraham, United States District Judge

APPROVED FOR ENTRY:

/s/ Donald Macleay, Attorney for Complainants
/s/ John C. Ridley, Attorney for Intervening Complainants
/s/ John H. Earle, Attorney for United States of America
/s/ H. Niel Garson, Attorney for Interstate Commerce Commission
/s/ Palmer Hutcheson, Jr., Attorney for Intervening Defendant Railroads.

[fol. 82] APPENDIX A TO JUDGMENT

The intervening railroads are as follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Sante Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Wabash Railroad Company

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—
Filed October 18, 1956

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on August 20, 1956.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the record made before the Commission filed with the district court and the following:

(a) Complaint filed February 17, 1956 by Dixie Carriers, Inc., et al., plaintiffs, including the exhibits attached thereto;

[fol. 84] (b) Motion to intervene as plaintiffs filed by Joe D. Hughes, Inc., et al;

(c) Complaint filed by Joe D. Hughes, Inc., et al;

(d) Motion and notice of motion of the Atchison, Topeka and Santa Fe Railway Company, et al., for leave to intervene as defendant;

(e) Motion and notice of motion of the Interstate Commerce Commission for leave to intervene;

(f) Answer of the United States of America, defendant, to the intervening complaint;

(g) Answer of the Interstate Commerce Commission, intervening defendant, to the complaint;

(h) Answer of the Interstate Commerce Commission, intervening defendant, to the complaint of Joe D. Hughes, Inc., et al., intervening complainant;

(i) Answer of the Atchison, Topeka and Santa Fe Railway Company, et al., intervening defendant, to the complaint;

(j) Motion and notice of motion of Wabash Railroad Company for leave to intervene;

(k) Answer of Wabash Railroad Company, intervening defendant, to the complaint;

(l) Order of the court or docket entry allowing intervention of the Interstate Commerce Commission;

(m) Order of the court or docket entry allowing intervention of the Atchison, Topeka and Santa Fe Railway Company, et al;

(n) Order of the court or docket entry allowing intervention by the Wabash Railroad Company;

(o) Order or notice setting the case for trial on May 18, 1956;

(p) Opinion of the court filed July 31, 1956;

(q) Final judgment entered August 20, 1956;

(r) This notice of appeal.

[fol. 85] III.

The following questions are presented by this appeal:

1. Whether the Commission's order vacating the suspension is subject to judicial review?

2. Whether the Commission was required by Section 8 of the Administrative Procedure Act to make findings in support of its order vacating the suspension?

3. Whether the district court erred in enjoining the operation of the rate schedules after they had gone into effect, but prior to a final decision on their lawfulness by the Commission?

4. Whether the Commission is required to hold a hearing before granting fourth section relief?

5. Whether the Commission is required by Section 8 of the Administrative Procedure Act to make findings in support of its order granting temporary relief from the long and short haul provisions of Section 4 of the Interstate Commerce Act?

6. Whether competing carriers have standing to challenge orders of the Commission under Section 4?

/s/ Robert W. Ginnane, General Counsel, /s/ H. Neil Garson, Assistant General Counsel, Attorneys for Interstate Commerce Commission.

[fol. 86] Certificate of Service (omitted in printing).

[fol. 89] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERVENING RAILROADS TO THE SUPREME COURT OF THE UNITED STATES— Filed October 18, 1956

I.

Notice is hereby given that the intervening railroad defendants, as listed in Appendix A attached hereto, hereby appeal to the Supreme Court of the United States from the final decree and judgment entered on August 20, 1956.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101(b).

II.

The Clerk is requested that there be included in the transcript of record for transmission to the Clerk of the Supreme Court the matters listed in notice of appeal filed by the Interstate Commerce Commission.

III.

The following questions are presented by this appeal:

1. Is an Interstate Commerce Commission order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Did the District Court err in holding invalid, and restraining the enforcement of, an order vacating the

[fol. 90] suspension of rates, after such rates had gone into effect and prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Is the Interstate Commerce Commission required to hold a hearing before granting temporary relief from the prohibitions of 49 U.S.C., Section 4(1)?

5. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, granting temporary relief from the prohibitions of 49 U.S.C., Section 4(1)?

6. Do competing carriers have standing to challenge orders issued by the Interstate Commerce Commission pursuant to 49 U.S.C., Section 4(1)?

7. Did the District Court err in holding invalid, and restraining the enforcement of, an order granting temporary relief from the prohibitions of 49 U.S.C., Section 4(1), after the rates involved had gone into effect and prior to a final Interstate Commerce Commission decision on whether to grant permanent relief?

8. Does the Interstate Commerce Commission have the power to correct an order after the validity of the original order has been challenged by court action?

/s/ Palmer Hutcheson, Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas, Attorney for Intervening Railroad Defendants.

[fol. 91] Of Counsel:

Harvey Huston, 1211 Railway Exchange, Chicago 4, Illinois.

Richard J. Murphy, 1225 LaSalle Street Station, Chicago, Illinois.

Proof of Service (omitted in printing).

[fol. 93] APPENDIX A—LIST OF INTERVENING RAILROADS Omitted. Printed side page 82 ante.

[fol. 94] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY THE UNITED STATES OF AMERICA TO THE SUPREME COURT OF THE UNITED STATES—
Filed October 19, 1956

I.

Notice is hereby given that the United States of America, a defendant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on August 20, 1956.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101 (b).

II.

Intervenor Interstate Commerce Commission having previously filed a notice of appeal in which it requested the clerk of this Court to prepare for transmission to the Clerk of the Supreme Court of the United States a transcript of all parts of the record in this case which the United States believes to be pertinent to its appeal except this notice of appeal, the clerk is requested to transmit additionally to the Clerk of the Supreme Court this notice of appeal.

[fol. 95] III.

The following questions are presented by this appeal:

1. Whether the order of the Interstate Commerce Commission vacating the suspension is subject to judicial review.

2. Whether the Commission was required by Section 8 of the Administrative Procedure Act to make findings in support of its order vacating the suspension.

3. Whether the district court erred in enjoining the operation of the rate schedules after they had gone into effect, but prior to a final decision on their lawfulness by the Commission.

4. Whether the Commission is required to hold a hearing before granting relief pursuant to Section 4(1) of the Interstate Commerce Act.

5. Whether the Commission is required by Section 8 of the Administrative Procedure Act to make findings in support of its order granting temporary relief from the long and short haul provisions of said Section 4(1).

6. Whether competing carriers have standing to challenge orders of the Commission under Section 4(1).

/s/ Malcolm R. Wilkey, United States Attorney for the Southern District of Texas.

[fol. 96] Proof of Service (omitted in printing).

[fol. 107] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 108] SUPREME COURT OF THE UNITED STATES

Nos. 647, 654 and 655, October Term, 1956

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Appellants,

v.

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, et al.;

UNITED STATES OF AMERICA, Appellant,

v.

DIXIE CARRIERS, INC., et al.; and,
INTERSTATE COMMERCE COMMISSION, Appellant,

v.

DIXIE CARRIERS, INC., et al.

APPEALS from the United States District Court for the Southern District of Texas.

ORDER NOTING PROBABLE JURISDICTION—March 25, 1957

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

Mr. Justice Whittaker took no part in the consideration or decision of these cases.

[fol. 109] PLAINTIFF'S EXHIBIT No. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. 9544

DIXIE CARRIERS, INC., et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTE OF EVIDENCE—NUMBER ONE

Plaintiffs offer, introduce and file in evidence the following copies of documents filed with the Interstate Commerce Commission in its proceeding under Fourth Section Application No. 31120 and Investigation and Suspension Docket No. 6491, certified by the Secretary of the said Commission:

1. Fourth Section Application No. 31120, dated September 16, 1955.
2. Amendment No. 1 to Fourth Section Application No. 31120, dated October 20, 1955.
3. Petition for Suspension filed by Waterways Freight Bureau, dated October 13, 1955.
4. Petition for Denial of Fourth Section Application filed by Waterways Freight Bureau, dated October 13, 1955. (Also attached to number 3 above as Exhibit A thereto.)
5. Petition for Suspension filed by Federal Barge Lines, Inc., dated October 13, 1955.
6. Protest and Application for Suspension filed by Brownsville Navigation District of Cameron County, Texas, and Port of Brownsville, dated October 13, 1955.

7. Petition for Suspension filed by Barge Service Corporation, dated October 10, 1955.

8. Protest and Petition for Suspension filed by Houston Barge Terminal Corporation, dated October 10, 1955.

9. Petition for Suspension and Denial of Fourth Section Application filed by American Iron and Machine Works Company and the Chamber of Commerce of Oklahoma City, Oklahoma, dated October 10, 1955.

[fol. 110] 10. Application of Hunsaker Trucking Contractor, Inc., et al, for Suspension and Denial of Fourth Section Application, dated October 10, 1955.

11. Petition for Suspension and Denial of Fourth Section Relief filed by Newtex Steamship Corporation, Pan-Atlantic Steamship Corporation and Seatrain Lines, Inc., dated October 13, 1955.

12. Petition for Suspension and Investigation filed by Nueces County Navigation District No. 1, Port of Corpus Christi, Texas, dated October 13, 1955.

13. Petition for Suspension filed by Houston Port Bureau, Inc., dated October 14, 1955.

14. Reply to Petitions for Suspension of Rates and Denial of Fourth Section Relief filed by Agent Kratzmeir for interested rail carriers, dated October 19, 1955.

15. Reply to Protests and Requests for Suspension and Investigation filed by Carter Oil Company, dated October 21, 1955.

16. Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Fourth Section Application No. 31120, dated October 26, 1955.

17. Petition of Railroad Respondents for Reconsideration by the Commission of the Order of the Suspension Board dated October 20, 1955, in I. & S. Docket No. 6491, dated October 26, 1955.

18. Reply to Petition of Railroads for Fourth Section Relief filed by Waterways Freight Bureau, dated November 5, 1955.

19. Reply to Railroads' Petition for Vacation of Order of Suspension Board filed by Waterways Freight Bureau, dated November 5, 1955.

20. Reply to Petition for Immediate Fourth Section Authority filed by Barge Service Corporation and Houston Barge Terminal Corporation, dated November 3, 1955.

21. Reply to Petition for Vacating of Suspension Order filed by Barge Service Corporation and Houston Barge Terminal Corporation, dated November 3, 1955.

22. Reply to Petition for Reconsideration of the Order of the Suspension Board and to Petition for Immediate Issuance of Authority Sought by Fourth Section Application No. 31120 filed by Brownsville Navigation District of Cameron County, Texas, and Port of Brownsville, dated November 3, 1955.

23. Reply to Petition for Reconsideration of the Order of the Suspension Board filed by Newtex Steamship Corporation, Pan-Atlantic Steamship Corporation and Seatrain Lines, Inc., dated November 2, 1955.

24. Reply to Petition for Reconsideration of Suspension Board Order and to Petition for Immediate Issuance of Fourth Section Authority filed by Hunsaker Trucking Contractor, Inc. et al, dated November 8, 1955.

25. Reply to Petition for Reconsideration of Order of Board of Suspension filed by American Iron and Machine Works and Oklahome City, Oklahoma, Chamber of Commerce, dated November 2, 1955.

26. Reply to Petitions of Railroads for Vacation of Suspension Order and Immediate Issuance of Fourth Section Relief filed by Federal Barge Lines, Inc., dated November 4, 1955.

[fol. 111] 27. Telegram dated November 8, 1955 from F. C. Kratzmeir to Secretary of the Interstate Commerce Commission.

28. Letter dated November 4, 1955 from Youngstown Sheet and Tube Company to Secretary of the Interstate Commerce Commission.

29. Letter dated November 4, 1955 from United States Steel Corporation to Interstate Commerce Commission.

30. Reply ot Sinclair Pipe Line Company to Petitions for Denial of Fourth Section Application and for Suspension, dated November 3, 1955.

31. Reply to Petitions for Relief filed by Waterways Freight Bureau, dated November 17, 1955.

32. Petition of Waterways Freight Bureau in I. & S. 6491 and FSA 31120 for Reconsideration of Orders effective December 17, 1955, Vacating Order of Suspension and Granting Fourth Section Relief, dated December 13, 1955.

33. Telegram dated December 13, 1955, from Attorney for Hunsaker Trucking Contractor, et al to Secretary of the Interstate Commerce Commission requesting reconsideration of the Commission's Order in I. & S. 6491 vacating suspension.

34. Letter dated December 13, 1955, from Attorney for Hunsaker et al to Secretary of the Interstate Commerce Commission, seeking reconsideration of Orders effective December 17, 1955.

35. Letter dated December 14, 1955, from Brownsville Navigation District of Cameron County, Texas and Port of Brownsville to Secretary of the Interstate Commerce Commission confirming telegraphic Petition for Reconsideration.

36. Telegram dated December 15, 1955, from Atlantic-Gulf Coastwise Steamship Freight Bureau petitioning for reconsideration of orders effective December 17, 1955.

37. Telegram dated December 15, 1955, from American Iron and Machine Works and Chamber of Commerce of Oklahoma City, Oklahoma, protesting vacation of Suspension Order.

38. Telegram dated December 15, 1955, from attorney for Santa Fe Ry., to Secretary of the Interstate Commerce Commission.

/s/ Alan S. Dale
Attorney for Plaintiffs.

[fol. 112] Secretary's Certificate (omitted in printing).

[fol. 113] (Handwritten—Recd. 9-19-55)
(Stamp—APR 25 '56 2588)

Fourth Section Application - (Commission's No. 31120
(Southwestern
(Freight Bureau No. B-6115

St. Louis, September 16, 1955
Pro. 71340-2

Steel or wrought iron pipe and related articles, from points in official (including Illinois), Southern Freight Association and Western Trunk Line territories to destinations in Arkansas, Louisiana (West of the Mississippi River), Missouri, New Mexico, Oklahoma and Texas.

[fol. 114] Fourth Section Application S.W.F.B.
No. B-6115—Page 30.

Certificate of Service

I hereby certify that I have this day served the foregoing document on the following parties by forwarding a true copy to each via 1st Class, prepaid U.S. Mail:

Union Barge Line Corporation,
Dravo Building,
5th & Liberty Aves.,
Pittsburgh 22, Pa.

Mr. J. G. Hartmann, TM,
Federal Barge Lines,
New Orleans 12, La.

Mr. W. Y. Wildman, Attorney,
Waterways Freight Bureau,
310 South Michigan Avenue,
Chicago 4, Ill.

Mr. L. L. Leonard, TM,
Sioux City & New Orleans Barge
Lines, Inc.,
Board of Trade Building,
Kansas City, Mo.

Mr. M. C. Pearson, TM,
Mississippi Valley Barge Line Co.,
1017 Olive Street,
St. Louis 1, Mo.

Mr. Nuel Belnap,
Belnap & McAuliffe,
1 North LaSalle St.,
Chicago 2, Ill.

Mr. W. A. Kernan, Mgr., Rates and Divs.,
American Barge Line Company,
1030 East Market Street,
Jeffersonville, Ind.

John I. Hay Co.,
332 S. Michigan Ave.,
Chicago, Ill.

Gulf Canal Lines,
904 M. & M. Bldg.,
Houston, Tex.

/s/ F. C. Kratzmeir
F. C. Kratzmeir

[fol. 115] (Handwritten—Filed 12/14/55)

Before the
INTERSTATE COMMERCE COMMISSION

I & S 6491
F.S.A. 31120

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

PETITION

for

RECONSIDERATION OF ORDERS
EFFECTIVE DECEMBER 17, 1955

VACATING ORDER OF SUSPENSION AND GRANTING
FOURTH SECTION RELIEF

ORAL ARGUMENT IS REQUESTED

WATERWAYS FREIGHT BUREAU[1]

Wesley A. Rogers,
Chairman

28 E. Jackson Blvd.
Chicago 4, Illinois
December 13, 1955

---

[1] Waterways Freight Bureau is organized under authority of the Commission extended under Section 5a of the Act. Its membership constitutes all the major common carriers by barge in the Mississippi River Basin system of inland connecting waterways, including the Louisiana-Texas-Florida Gulf Intracoastal waterway. The collective operations of these 18 companies account for some 95% of all such barge common carrier tonnage.

[fol. 116] PLAINTIFF'S EXHIBIT No. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. 9544

DIXIE CARRIERS, INC., et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTE OF EVIDENCE—NUMBER TWO

Plaintiffs offer, introduce and file in evidence the following copies of documents issued by the Interstate Commerce Commission in its proceedings under Fourth Section Application No. 31120, and Investigation and Suspension Docket No. 6491, certified by the Secretary of the said Commission:

1. Order of the Commission, Board of Suspension, dated October 20, 1955, in I. & S. Docket No. 6491, served October 21, 1955.

2. Corrected Order of the Commission, Board of Suspension, dated October 20, 1955, in I. & S. Docket No. 6491, served November 1, 1955.

3. Second Corrected Order of the Commission, Board of Suspension, dated October 20, 1955, in I. & S. Docket No. 6491, served November 8, 1955.

4. Action of the Commission dated November 25, 1955, in I. & S. Docket No. 6491 and FSA No. 31120, assigning the proceedings for hearing on January 24, 1956 in Houston, Texas, before Examiner Hanson, served November 25, 1955.

5. Order of the Commission, Division 2, dated December 7, 1955, in I. & S. Docket No. 6491, served December 13, 1955.

6. Corrected Order of the Commission, Division 2, dated December 7, 1955, in I. & S. Docket No. 6491, served March 2, 1956.

7. Order of the Commission, Division 2, dated December 9, 1955, entitled Twenty-Sixty Supplemental Fourth Section Order No. 17160, issued responsive to Fourth Section Application No. 31120, served December 29, 1955.

8. Corrected Twenty-Sixth Supplemental Fourth Section Order No. 17160, by the Commission, Division 2, dated December 9, 1955, served March 2, 1956.

[fol. 117] 9. Notice dated December 15, 1955, referring to I. & S. Docket No. 6491, served December 16, 1955.

10. Notice dated December 16, 1955, referring to I. & S. Docket No. 6491, served December 16, 1955.

11. Order of the Commission, Division 2, dated December 16, 1955, in I. & S. Docket No. 6491, served December 16, 1955.

12. Order of the Commission, Division 2, dated December 16, 1955, in I. & S. Docket No. 6491 and Fourth Section Application No. 31120, denying Petitions for Reconsideration, served April 27, 1956.

/s/ Alan S. Dale
Attorney for Plaintiffs.

[fol. 118] SECRETARY'S CERTIFICATE (omitted in printing).

[fol. 120] (Handwritten—Served 10-21-55)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except on page 6 thereof, ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy and be in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 121] (Handwritten—Served 11-1-55)

CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new

rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows:
On page 6 thereof, ITEM 360-C, and on page 2 thereof all matter referring to ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be

changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 122] (Handwritten—Served 11-8-55)

SECOND CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows:
On page 6 thereof, ITEM 360-C, and on pages 2 and 4 thereof all matter referring to ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to

believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. MCCOY,
Secretary

(SEAL)

[fol. 123] (Handwritten—Served 11-25-55)
I&S No. 6491, ET AL TM:HA

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

NOVEMBER 25, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE—OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION No. 31120

STEEL AND WROUGHT IRON PIPE TO THE SOUTHWEST

The above-entitled proceedings are assigned for hearing on January 2', 1956, at 9:30 o'clock a.m., United States Standard Time, at the Federal Office Bldg., Franklin & Fannin Sts., Houston, Tex., before Examiner, Hanson.

The attention of the parties is directed to the General Rules of Practice, Rule 84(d), the provisions of which point to the desirability of interchange of exhibits and other pertinent material before the hearing.

By the Commission.

HAROLD D. McCOY,
Secretary

[fol. 124] (Handwritten—Served 12-13-55)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; and good cause appearing therefor:

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 125] (Handwritten—Served 3-2-56)

CORRECTED ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955.

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by Newtex Steamship Corp., filed November 3, 1955,

Brownsville Navigation District, filed November 4, 1955, Barge Service Corp., Youngstown Sheet & Tube Co., American Iron and Machine Co., Waterways Freight Bureau, filed November 7, 1955, thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not result in rates and charges, rules, regulations, or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or constitute unfair and destructive competitive practices in contravention of the National Transportation Policy or be in contravention of the provisions of section 4 of the Interstate Commerce Act; Therefore,

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 126] (Handwritten—Served March 2, 1956)

Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A. D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratzmeir, Agent, for and on behalf of carriers

parties to his tariff I.C.C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act; and upon further consideration of fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

> *It is further ordered,* That, upon the effective date of the rates as to which relief is hereinafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to

complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 127] (Handwritten—Served Dec. 29, 1955)

Twenty-sixth Supplemental Fourth Section Order
No. 17160

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A.D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratzmeir, Agent, for and on behalf of carriers parties to his tariff I.C.C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, upon the effective date of the rates as to which relief is hereinafter authorized,

and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 128] (Handwritten—Served 12-16-55)

INTERSTATE COMMERCE COMMISSION
Washington

December 15, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

NOTICE

This refers to certain petitions tendered herein seeking reconsideration or review by the Commission of appellate

action of Division 2 in which the Division modified the action of the Board of Suspension.

The said petitions will not be entertained for consideration by the entire Commission for the reason that this matter has been delegated to an appellate division and its action is not subject to review by the entire Commission. See item 8.4 of the Organization Minutes of the Commission, 20 Federal Register 5031, 5035.

The petitions will be considered by the appropriate appellate division for action as provided by Rule 101(g) of the Commission's General Rules of Practice.

HAROLD D. McCOY,
Secretary

[fol. 129] (Handwritten—Served 12-16-55)

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D. C.

December 16, 1955

NOTICE

Upon consideration of a petition filed by respondents requesting vacation of the order of suspension in I. and S. Docket No. 6491 dated October 20, 1955, the Commission in its order of December 7, 1955 concluded to vacate the order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved.

Several of the protestants filed petitions requesting the Commission to reconsider its action and to stay the order of December 7, 1955.

The Commission today has concluded that sufficient reasons have not been shown for staying the order of December 7, 1955 and the petitions making such request have been denied.

HAROLD D. McCOY,
Secretary

[fol. 130] (Handwritten—Served 12-16-55)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 16th day of December, A. D., 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated December 7, 1955 the Commission, Division 2, acting as an appellate division, upon consideration of a petition requesting that the order of suspension dated October 20, 1955 be vacated, and replies thereto, and good cause appearing therefor, concluded to vacate the order of suspension as of December 17, 1955, but continued the investigation of the schedules involved;

It further appearing, That several of the protestants have requested reconsideration of the action of Division 2 mentioned above, and that the order of vacation be stayed pending further consideration;

And it further appearing, That sufficient reasons have not been shown for staying the order of December 7, 1955;

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission, Division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 131] (Handwritten—Served April 27, 1956)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 16th day of December, 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION No. 31120

STEEL AND WROUGHT PIPE TO THE SOUTHWEST

It appearing, That by an order dated December 9, 1955, the Commission, Division 2, acting as an appellate division, upon consideration of a petition by respondents requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section application No. 31120, Steel and Wrought Pipe to the Southwest, be reversed, and the order of suspension be vacated, and replies thereto, and for good cause appearing therefor, concluded to grant the relief prayed for in aforesaid application and to vacate the order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved;

It further appearing, That consideration has been given to petitions filed by several of the protestants requesting (1) reconsideration of the action of Division 2, acting as an appellate division, granting fourth section relief in the Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected), Iron and Steel Pipe to the Southwest, entered December 9, 1955, and that the order be stayed pending reconsideration; and (2) for oral argument in Fourth Section Application No. 31120 and Investigation and Suspension Docket No. 6491;

And it further appearing, That sufficient reasons have not been shown for staying the order of December 9, 1955; and that oral argument is deemed to be unnecessary;

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission, Division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 132] PLAINTIFF'S EXHIBIT No. 3-(1)

[fol. 133] At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D.C., on the 21st day of October, A.D. 1955.

ROBERT NEWEL,)
R. R. SHERMAN,) Members of the Board.
R. H. LAWRY, JR.)

IRON AND STEEL PIPE TO THE SOUTHWEST.
FOURTH SECTION APPLICATION No. 31120

Voted to withhold relief pending hearing, and to assign the above application for hearing with I.& S. No. 6491.

[fol. 134] PLAINTIFF'S EXHIBIT No. 3-(2)

[fol. 135] At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 7th day of December, A. D. 1955.

HOWARD G. FREAS,)
KELSO ELLIOTT,) Commissioners.
JOHN H. WINCHELL,)

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST.
I.& S. 6491.

Upon consideration of petition requesting vacation of the order of suspension:

Voted to grant the petition to vacate the order of suspension but to continue the proceeding of investigation.

[fol. 136] PLAINTIFF'S EXHIBIT No. 3-(3)

[fol. 137] At a Session of the INTERSTAT COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 9th day of December, A. D. 1955.

HOWARD G. FREAS,)
KELSO ELLIOTT,) Commissioners.
JOHN H. WINCHELL,)

Twenty-sixth supplemental fourth-section order No. 17160, in fourth-section application No. 31120, Iron and Steel Pipe to the Southwest, approved and adopted.

[fol. 138] PLAINTIFF'S EXHIBIT No. 3-(4)

[fol. 139] At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 16th day of December, A.D. 1955.

HOWARD G. FREAS,)
KELSO ELLIOTT,) Commissioners.
JOHN H. WINCHELL,)

PIPE—OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST.
I.& S. 6491.

Petitions of several protestants for reconsideration in the above-entitled proceeding denied.

[fol. 140] PLAINTIFF'S EXHIBIT No. 3-(5)

[fol. 141] At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 16th day of December, A.D. 1955.

HOWARD G. FREAS,
KELSO ELLIOTT,
JOHN H. WINCHELL, } Commissioners.

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST.
I.& S. 6491.

STEEL AND WROUGHT PIPE TO THE SOUTHWEST.

FOURTH SECTION APPLICATION No. 31120

Upon consideration of petitions filed by several of the protestants requesting (1) reconsideration of the action of Division 2, acting as an appellate division, granting fourth section relief in the Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected), Iron and Steel Pipe to the Southwest, entered December 9, 1955, and that the order be stayed pending reconsideration; and (2) for oral argument in Fourth Section Application No. 31120 and I.& S. Docket No. 6491:

Order in the above-entitled proceedings denying the said petitions approved and adopted.